

(353)

T H E
F O R M
O F
P R O C E S S
B E F O R E
The COURT of JUSTICIARY
I N
SCOTLAND;

C O N T A I N I N G

The CONSTITUTION of the Sovereign
Criminal COURT, and the Way and
Manner of their Procedure:

Together with

An Account of the Circuit Courts, the Way
and Manner of giving up Dittays, and ju-
dicial Proceedings thereto relating.

By JOHN LOUTHIAN Writer in *Edinburgh*. K

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PROCESS

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T H E
P R E F A C E.



*USTOM has made it fashionable, and almost universally so, that scarce a Book of any Value, but has a Preface, shewing the Design of the Author, Scope of the Matter handled therein, or excusing such and such Things, as may appear at first View to be superfluous or wrong: I shall not harrangue long about any of these. But seeing the great Concerns of Mankind are their Lives, Fortunes and Reputation, and these Three suffering at once in Crimes, it is their great Interest, to know the Procedure in such Accusations, and how to evite them, and defend themselves when accused. For which Purpose, I have endeavoured, for
the*

the Good of others, more especially the unlucky and miserable Part, who may be tristed with such Accusations and Trials; whether guilty or innocent, to collect a summary Form of Process, before his Majesty's Sovereign Court of Justiciary in Scotland; whereby such as apply themselves to that Study, may, at one View, understand the several Steps of Procedure, in all criminal Actions, that can come in before that Court: And that the Pannels, or such as are accused, may understand their own Trials, and be sensible of what is to be done, in exculpating themselves of the Crimes laid to their Charge; whereby their Accusers may have no Handle against them, in objecting against the Formality of executing their respective Exculpations; which if they do not timeously advert to the Way and Manner of executing thereof, Pannels may be precluded of that legal Remedy, through their own and Doers Ignorance, and may cost them no less than their Lives. I have insert the Habeas Corpus Act of Parliament, in this Form of Process, which will give a clear Light to every discerning Reader. Now, next to the Soul's Concerns, and the Matters of Eternity, a Man's Life, good Fame and Estate, being

The Preface.

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being his great Concern here, may be brought to Hazard, through even the Ignorance of Form, when precluded of his just and legal Exculpation : So my Design is, That every one may have a View, both of the Form of Pursuit and Exculpation ; and shall conclude, with what that eminent Lawyer, Sir George Mackenzie, introduces his Criminals, That God Almighty, having created this lower World, to be equally an Instance of his Power and of his Goodness, did furnish it with great Variety of excellent and wonderful Productions : But lest these should be defaced at Pleasure by Man, who, having ruined himself, doth little value, and is much inclined to ruine every Thing besides. Therefore God did not only imprint, upon his Soul, some common Principles, whereby he is led to love good Order ; but did likewise fence the Oeconomy, and Government he had placed in the World, with Rewards and Punishments : And it was just, That as these, who did viruously, were to be rewarded ; so these who were vitious should be punished ; which Punishments are the subject Matter of the criminal Law. And I say, That this Form of Process shews the Way of determining Causes according to the same Law.

J. L.

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THE



THE
Form of Proceſs
BEFORE
The Juſticiary Court in
Scotland.

SECTION I.
*Anent the Conſtitution of the So-
vereign Criminal Court.*



THE Juſtice Court of Old, was the
Supreme Court of the Nation, in
Causes Criminal, and had then a
great Part of that Jurisdiction,
which the Lords of Seſſion have
now *. And had for its Members, The Juſtice
General, the Juſtice Clerk, the Juſtice Deputes,
A the

* Vide Reg. Maj. Lib. 1. Cap. 5. Num. 2. & Lib. 2.
P. 74. Quon. Attach. Cap. 52 & 53. Lib. 3. Cap. 28.

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the Clerk Depute, the Dempster, the Officers and the Macers. But now they consist of, the Justice General, Justice Clerk, Five Lords Commissioners of Justiciary, the Clerk Depute, his Substitute, three Macers and the Dempster.

The Justice General is constitute by a Gift under the Great Seal, either *ad vitam*, or by a temporary Commission, and is called, *The Chief Justice* in all the Registers, and the principal Justiciar, and his Commission is recorded in the Books of Adjournal. This Great Officer of Justice sits only in the Justice Court, when he thinks fit to come, and may go or not to the Circuits as he pleases.

The Justice Clerk has his Commission also from his Majesty under the Great Seal, sometimes during life, and sometimes otherwise*, with Power to him to appoint Deputes, for whom he shall be answerable, and is called in his Gift, which is recorded in the Books of *Ajournal*, (*Clericus nostræ Justiciariæ*) and before the Union he was one of the Officers of State.

The Justice Deputes were not limited to any definite Number, but usually they were two, and had each of them a Pension from his Majesty when they were constitute by a Gift

* Vide Books of Adjournal 4. Jun: 1693. 28. July 1671. Justice Clerks for Life, &c.

before the Justiciary Court. 3

Gift from him, which passed the Privy Seal only, and these were called his Majesty's Justice Deputes, and were not Deputes to the Justice General, for else they could not sit in Judgment with him as they did, and in effect they had an equal Power and Voice with him. And when his Majesty directed any Letter to them, he directed it, *To our Trusty and well beloved, our Justice General and Justice Deputes.* But of old there were Eight Justice Deputes; they had the Privilege of being present at the Privy Council, which was thought very fit, because many Criminal Causes came in before them. *Vide James VI. Par. 11. Cap. 81.*

By the first Article of the Regulations 1672, the Justice Deputes were suppressed and Five of the Lords of Session are joined to the Justice General and Justice Clerk. *Vide Char. II. Par. 2. Ses. 3. Cap. 18.*

The said five Lords have each of them a Letter from the Sovereign for being Judges, which is recorded in the Books of *Adjournal*; and generally they continue during Life.

The Justice Clerk's Depute has a Commission from the Justice Clerk during Life, and is allowed a Substitute, and by his Commission, which is recorded in the Books of *Adjournal*, he has Power to be Clerk to all Courts holden by his Majesty's Justice Gene-

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ral, Justice Clerk and Commissioners of Justiciary, or any having particular Commission, either at *Edinburgh*, or else where.

It seems of old, the Writers to the Signet did use to write Criminal Letters, without receiving Caution; now that is discharged. And tho' Writers to the Signet may subscribe the Letters, in Absence of the Clerk or his Depute, yet the Justice Clerk's Depute, can only write the Deliverance on the Bill and receive the Caution, and writes on the Bill, *Soverety is found*, and subscribes the same, and his receiving Caution is warranted by Act of Parliament. *Vide Ja. IV. Par. 6. Cap. 78.*

The Clerk's chief Business is, he receives from the Raiser of Criminal Letters or Letters of Recrimination, Caution to report them duly execute and indorsed, *Ja. VI. Par. 6. Act 78.* And from those against whom they are raised, Caution to appear to underly the Law. From the Pursuer of a Cause advocated to the Justices, new Caution to insist; and from the Raiser of the Advocation, new Surety to appear before their Lordships. Such Bonds of Caution are entred in a Book kept for that use, and the Clerk is answerable for the Sufficiency of the Sureties. All Criminal Letters, Diligences, Exculpations, Intimations, Liberations, Laborrowes, Denunciations, Hornings, Captions are subscribed by him, that
pass

before the Justiciary Court. 5

pass under the Seal of Court; he marks the *Sederunt* of the Judges, writes the Depositions of Witnesses, Deliverances of Bills; records the Informations of Parties, writes the Interlocutors and definitive Sentences, and records the Verdicts, and minutes any additional Debate that may happen in open Court after the Informations, before advising the Relevancy.

The Justice Court has three Macers, tho' they are not restricted to that Number. They have their Commissions from the Justice General, *ad vitam aut culpam*, which are recorded in the Books of Adjournal, and each of them has a Mace and black Gown. The Mace used by them in the Court, is an Iron Rod, ensign'd with an Imperial Crown, which is the Symbol of Power, and besides it is imbossed below the Crown with the four Badges of the Nation, to wit, *Thistle, Rose, Flower de Luce, and Harp*. The Macer's chief Business is to execute all Indictments, Criminal Letters, &c. citing of Assysers and Witnesses against and for Pannels, executing Warrants for Imprisonment, waiting on the Judges all the Dyets of Court, bringing out and returning Pannels from and to Prison, to inclose Juries, and attend upon them while they are drawing up their Verdict,

and repeats after the Clerk all Sentences that are not Capital.

The Dempster of Court, is one who pronounces the Pannels Doom or Sentence given by the Lords, read by the Clerk, and repeated by him *in ipsissimis verbis*; and is one whom the Town of *Edinburgh* supplies the Court with, and has his Commission from the Town for that Effect, recorded in the Books of Adjournal.

The Justice Court has a Seal, which is appended to all their Letters and publick Acts, and is kept by the Justice Clerk's Depute, which Seal bears the Royal Arms.

And the Records of the Court, which are kept by the Justice Clerk's Depute, are termed the *Books of Adjournal*.

The Judges are authorized to regulate the inferior Officers of Court, and order every other Thing concerning it. The Court meets each *Monday* at Nine of the Clock in time of Session, and oftner, if Business so require.

The Justice General, if present, presides, and in his Absence, the Justice Clerk, and in Absence of both, these present elect one of their own Number to preside, four of them being always a *Quorum* of the Court in time of the sitting of the Lords of Session, and three in time of their Vacance, *vide Act of Regulations,*
Car.

before the Justiciary Court. 7

Car. II. Par. 2. Sess. 3. Cap. 18. Car. II. Par. 3. Cap. 22. except at the Circuit Courts.

For the Splendor of the Court, all the Judges sit in red Robes faced with white Satin; that of the Justice General's being lined with Ermine for Distinction, and the Justice Clerk's being distinguished by Outcuttings or Muffings.

The Sovereignty of the Court is so great and conspicuous, that who ever strikes or hurts any Person before them sitting in Judgment, incurs the Pain of Death. *Vide Ja. VI. Par. 13. Cap. 73.*

And none dare presume to speak unless desired, or interrupt or disturb the Court by Noise, or any other manner of way, under the Pain of Imprisonment, and being fined at the Judges Discretion: As also the Lords advise with open Doors, in presence of the Panel and Assize, and all others.

But in Cases of Rap, Adultery, and the like, the Lords may remove all Persons, except Parties and Procurators, at the leading of the Probation, as they shall see Cause. *Vide W. and Mary Par. 1. Sess. 5. Cap. 4.* And further all the Privileges of that August Court, are ratified by Act of Parliament. *Vide, W. and Mary Par. 1. Sess. 5. Cap. 4.*

The Justice Court hath no stated Terms of sitting, nor any Vacation, except that necessary One when the Lords go in Circuit.

All the Diets of the Court are peremptory, so that if an Indictment or Criminal Summons be not called on the precise Day of the Letters, it falls, and a new Indictment or Letters must be raised.

A Quorum of the Lords is necessary to sign a List of Assize, or for judging; but one Lord may adjourn the Court, or continue a Diet of Compearance till another certain Day, or may pass Bills for raising Criminal Letters, Letters of Intimation, or Letters of Diligence for citing Criminals, Witnesses and Assizers in case of Indictments, or Bills for Letters of Exculpation, Denunciation, or Recrimination, &c.

S E C T. II.

Anent what Crimes are competent to be pursued before the Justiciary Court.

THE Court is Judge of all Crimes, both Capital and Arbitrary, unless the Cause admit of Dilators in Matters of Proof, which this Court by its Form does not allow, the Diets thereof being peremptory. And therefore, in all Improbations, tho' they sustain themselves Judges, they remit the

before the Justiciary Court. 9

the Cognizance thereof in difficult Cases to the Lords of Session, who, if there be a plenary Proof before them, return the same to the Lords of Justiciary, (for tho' the Lords of Session be Judges of the Proof, and pronounce Decreet after a full and fair Debate, yet they can give no capital Sentence;) And their Decreet bears, 'The Lords remit the Defender to the Justices to be punished, *tanquam falsarius*, and to underly the Law criminal-ly, and ordain that Ordinance to be insert in their Books of Adjournal.' And the Lords of Justiciary impower the Lord Advocate to lay before them this Crime, by way of a criminal Libel. This is done upon indicting the Pannel in the Terms of the Decreet of Improbation, and the Decreet is libelled in full as to the Crime and Proof, and an Extract thereof lyes in the Clerks Hand, that the Prisoner may see the same, also a List of Forty five Assizers, with a Copy of the Indictment, and a short Copy by way of Charge, are given to him by a Macer or Messenger, in order for his Appearance before the Lords against a certain Day; and no further Witnesses or Proof is ad-duced. Thereafter the Lords give their Interlocutor on the Relevancy of the Libel, finding the Crime, as libelled, relevant to infer the Pains of Law, and remit the same to the Knowledge of an Assize; then Fifteen out

of

of the Five and Forty Assizers are chosen and sworn. And the Advocate for Probation, adduces the Lords of Sessions Decreet, which is all read in presence of the Lords, Assize and Pannel, and thereafter the Jury are ordained to inclose, and return their Verdict the next Day at Twelve a Clock, and the hail Fifteen to be present, each under the Pain of a 100 Merks. In Obedience whereunto they are inclosed, and choose a Chancellor and Clerk, and going through the Decreet and Indictment founded thereon, they (all in one Voice, or by Plurality of Voices) find the Libel proven in the Terms of the Decreet, or Not, and give their Verdict accordingly; the Day following the Chancellor, accompanied with the Assize, presents it, sealed to the Lords, who after reading thereof, give Sentence against the Pannel.

The capital Crimes pursued before the Court are, viz.

Blasphemy, *Car. II. Par. 1. Cap. 21. W.*
and *M. Par. 1. Sess. 5. Cap. 11.*

Heresie, *Ja. VI. Par. 2. Cap. 28.*

Treason, *Ja. VI. Par. 8. Cap. 129.*

Sedition, *Vide* Treason.

Atheism, or the denying of a God, *Eccl. Act*
11. Sess. 5. Par. K. W.

Poisoning, *Ja. VI. Par. 7. Cap. 30, and 31.*
Fire

before the Justiciary Court II

Fire raising, *Ja. VI. Par. 1. Cap. 33.*

Witch-craft, *2. M. Par. 9. Cap. 73.*

Murder, *Ja. VI. Par. 8. Cap. 51.*

Duelling or Combat, *Ja. VI. Par. 16. Cap.*

12. K. W. Par. 1. Sess. Cap. 32.

Paricide, *Ja. VI. Par. 16. Cap. 200.*

Patricide, *Vide Treason.*

Women murdering their own Children, *W.*

and M. Par. 1. Sess. 2. Cap. 21.

Incest, *Ja. VI. Par. 1. Cap. 14. Levi. xviii.*

Sodomy, *Levi. xx Cap.*

Beastiality, *ditto.*

Ravishing of Women, *Ja. VI. Par. 7. Cap. 118.*

Nottour Adultery *2. M. Par. 9. Cap. 74.*

Act 105. Par. 7. Ja. VI.

Theft, *Ja. VI. Par. 6. Cap. 74. Par. 7. Cap. 12.*

Par. 11. Cap. 83. Par. 18. Cap. 5.

Hamesucken, *Reg. Maj. L. 4. Cap. 9. and 10.*

Forgery and Falsehood, *Ja. VI. Par. 23. Cap. 22.*

Robbery, *Ja. II. Par. 12. Cap. 53.*

Common Oppression, *Ja. VI. Par. 11. Cap. 88.*

Oppression, *Ja. IV. Par. 4. Cap. 42.*

Manslaughter, *Ja. IV. Par. 3. Cap. 28.*

Mutilation or Demembration premeditate, *Ja.*

IV. Par. 3. Cap. 28.

Beating or Cursing of Parents, *Car. II. Par.*

1. Sess. 1. Cap. 20.

Egyptians and masterful Sorners, *Ja. VI. Par.*

10. Cap. 13.

*Among which Crimes were the ancient Pleas of the
Crown*

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Crown viz. Murder, Robbery, Fire-raising and Ravishing of Women.

The Crimesailable pursued before the Criminal Court are, viz.

Cominations and Threatnings, *see Lawbor. Ja. VI. Par 7. Cap. 117.*

Bloodwits, and atrocious Riots.

Deforcing of Messengers, *Ja. VI. Par. 7. Cap. 118.*

Incroaching on the Property of others.
Breach of Prison.

Forestalling and Regrating, *Ja. VI. Par. 12. Cap. 48.*

Bearing of unlawful Weapons *Ja. VI. Par. 16. Act 6.*

Hearers and Sayers of Mass, *Queen Anne Par. 1. Cap. 3. 1702. and Par. Cap. 12. 1703.*

Spulzies, petty Thefts, *Ja. VI. Par. 6. Cap. 19.*

Forethought Felony, *Ja. I. Par. 3. Cap. 51.*
Sabbath breaking, *Char. II. Par 1. Sej. 1. Cap. 18.*

Cutting of Green Wood, *Ja. I. Par. 2. Cap. 33.*
Fishing in forbidden Times, *K. Wil. Par. 1. Sej. 6. Cap. 33.*

Breaking of Cruives *Ja. VI. Par. 7. Cap. 111.*
Fishing in other Mens Properties.

Breaking of Orchards, Parks and Dykes,
Ja.

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Ja. VI. Par. 19. Cap. 3. Queen Mary Par. 6. Cap. 18.

Negligence of Officers in their Offices, *Ja. III. Par. 5. Act 26.*

Priests, Jesuits and Trafficking Papists and seminary Priests, *Queen Anne. Par 1. Cap. 2. 1702.*

Killing of Fowls in Pairing Time and within Inclosures, *Act 3. Sess. 8. and 9. Par. King William.*

Poining of Oxen in Time of Labouring, *Ja. IV. Par. 6. Cap. 98.*

Perjury, *Queen Mary Par. 5 Act 19.*

Bigamy, *Queen Mary Par. 5. Act 19.*

False Witness, *Queen Mary Par. 6. Cap. 46.*

Usury, *Ja. VI. Par. 23. Cap. 28.*

Simony, *Ja. VI. Par. 21. Act 1.*

Baratry, *Ja. VI. Par. 1. Cap. 2.*

Injuries Personal and Real, Partiality, *Ja. III. Par. 5. Act 26.*

Infamous Libels.

Swearing, *Ch. II. Par. 1 Sess. 1. Cap. 19.*

Bribery, *Ja. V. Par. 7. Act 104.*

Drunkennes, *Ja. VI. Par. 22. Cap. 20.*

Disturbers of the Kirk in Time of Divine Service, *Queen Mary Par. 5. Cap. 17.*

Users of false Weights and Measures, *Ja. IV. Par. 4. Cap. 47.*

Invaders, and Troublers of Kirk-men, *Ja. VI. Par. 11. Cap. 27.*

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Ministers neglecting to Pray in exprefs Words
for the King, Queen and Royal Family,
10 *Anne Cap. 7. §. 11.*

The other Crimes where we have no special Statute relating thereto, or Words adapted for the Crime, are called *Stellionate*, and are pursued upon the Common Law against Falsehood, or the Law to which the Crime has the nearest Affinity.

Treason may be pursued before the Court without a Commission of *Oyer and Terminer*, and has been done before the Circuit Courts.

And by the Act *Anno 7thmo Anne Reginae, Act for Improving the Union of the Two Kingdoms*, it is thereby enacted, " That Theft in Land-
" ed Men, Murder under Trust, Wilful Fire
" raising, Fireing Coal-heughs and Assassination-
" ons, which were declared to be Treason by
" particular Statutes in *Scotland*, shall af-
" ter the 1. Day of *July 1709*, be only ad-
" judged and deemed to be Capital Offences,
" and the Committers thereof, shall only
" be liable to such Pains and Punishments
" as by the Law of *Scotland* are inflicted u-
" pon the Committers of Capital Crimes
" and Offences, and the Persons Committers
" thereof are to be punished and tryed in the
" same manner, as by the Laws of *Scotland*
" is

before the Justiciary Court. 15

“ is provided in the Cases of other Capital
“ Crimes.

The Pursuer of the foresaid Crimes before the Court, is the Lord Advocate, or his Deputes, who may pursue all Crimes for the Publick, and albeit the private Parties should agree, they can insist, *ob vindictam publicam*; *Vide Ju. VI. Parliament II. Cap. 76.* The Advocate has his Commission from his Majesty by a Gift under the Great Seal, during Pleasure, with Power to him to appoint Deputes to the Court of Justiciary and Circuit Courts. And which are recorded in the Books of Adjournal.

S E C T. III.

*Anent the Way and Manner of
taking up and sisting Delinquents
before the said Court.*

THE Persons Guilty or alleged guilty of the foresaid Capital Crimes, or one or other of them, are, upon Information given in and signed by his Majesty's Advocate, or his Deputes, or private Parties, to any of the Lords of Justiciary, or other inferior Criminal Judges, ordered to be taken up, and the
War-

Warrant granted, is directed, To Maers, Messengers, and other Officers of the Law, &c. for apprehending and imprisoning the Person guilty in the next sure Tolbooth, therein to remain, until he be thence liberate in due Course of Law. And if the Information be given in to the inferior Judges, the warrant is directed to their Officers.

The Stile of the Information is as follows,

Unto the Right Honourable, the Lords Justice General, Justice Clerke, or in their Absence, to any other of the Lords,

The Petition and Information of A. B. against C. D.

Humbly sheweth,

That where, upon the — Day of — and — Year, the said C. D. having conceived a deadly Hatred, evil Will and Malice against E. F. did ly in wait for him, betwixt — and — in the County of — and Parish of — and has actually murdered him, with some Mortal Weapon, such as Durk or Poynard, whereof he instantly died, and the said C. D. having made his Escape, is said to be lurking and absconding himself in the Shire of — or some place thereabout, on purpose to shelter himself from Justice.

May

before the Justiciary Court. 17

May it therefore please your Lordship, to grant Warrant to all Officers of the Law, for Searching, Seeking and Apprehending the Person of the said C. D. and imprisoning him in sure Ward and Firmance, until he be tried for the above Crime. A. B.

The Form of the Warrant on the above Information is as follows,

By the Right Honourable; the Lord Justice General, or Lord Justice Clerk, or any other of the Lords.

Whereas, by an Information given into me, subscribed by *A. B, C. D,* is accused as guilty of the Murder of *E. F,* by lying in wait for him, upon the — Day of — in the County of — and Parish of —

And has actually murdered him; with some mortal Weapon, such as Durk or Poinard, whereof he instantly died; and the said *C. D.* having made his Escape, thereupon Warrant is craved to the Effect aftermentioned. *These*

therefore Command and Ordain, Sheriffs of Shires, Stewarts of Stewarties, Baillies of Regalities and their Deputes, Magistrates of Burghs Royal within their respective Jurisdictions, Macers of the Court of Justiciary, Messengers at Arms and Constables, to search

B

for;

for, seize and apprehend the Person of the said *C. D.* and commit him Prisoner in the next sure Tolbooth, therein to remain, until he be thence liberate in due Course of Law. For doing whereof this shall be to them and all concerned, a sufficient Warrant. Given at — the — Day of — and — Year.

The Person being apprehended, and put in Prison for a capital Crime, may be confined closs Prisoner for eight Days, and by the Act *Anno 7thimo, A. Reginae*, no Person accused of any capital Offence, or other Crime, in *Scotland*, is liable to any Torture.

But before the Criminal is found to be put in Prison, his Accusers may apply to inferior Judges, or to the Lord Advocate, or his Deputes, and take a Precognition of the Way and Manner the Crime was committed, upon the Faith and Candor of these who knew the same best, and were present at the committing of the said Crime, which is only a candid Account of what they know in the Matter, and may be obliged to declare upon Oath, if the Judge, Taker of the Precognition, find it necessary, which is called, in Terms of Court, a *Precognition*, and is the Standard for the Advocate, his Deputes, or private Party, to draw the Indictment or criminal Letters by, besides what other Evidence could be had in Relation to the said Crime.

And

before the Justiciary Court. 19

And in Case a Crime be committed within the Verge of any Jurisdiction, such as Royal Burghs, Sherifffdoms, Regalities and Baronies, &c. who have no Inclination to proceed against the Delinquent, they can imprison and detain therein his Person, take Precognition, and send the same to the Lord Advocate or his Deputes, who obtain Warrant from the Lord Justice General, Justice Clerk, or any other Lord in their absence, directed to the Magistrate of the Burgh, where the Prisoner is confined, for delivering up the Criminal's Person, in order to be transported from County to County by the Sheriffs thereof, to whom the Warrant is likewise directed; which is accordingly done, till he arrive at the Prison of *Edinburgh*, and every Sheriff or Fisk of Court, to whom the Execution of the Warrant is committed, orders a Party, attended by the common Officers of the County, for the Prisoner's safe Transportation, as is likewise directed in the Warrant, and gives Receipt to the Fisk of the County he receives him from, and so forth, until his Arrival in *Edinburgh* Prison, where likewise Receipt of the Prisoner is got from the Keeper thereof.

But in Case such Jurisdictions incline to prosecute their own Criminals, in Vertue of their Charters and Gifts of Erections, they judge them and bring them to condign Punishment, upon the

Legal Proofs as the Law directs, and in their Procedure, makes the Sovereign Court of Justiciary's Method in Trial, their *Regula Regulans*.

S E C T. IV.

The Method and Form of Advocating Criminal Actions, from before inferior Judges, to the Lords of Justiciary:

THE Lords of Justiciary, are in use to Advocate Causes from all inferior Criminal Judges, in Cases of Incompetency, Iniquity and Intricacy, as being the Head and Sovereign Court in judging of Crimes: Tho' of old the Lords of Session were lookt upon to be competent Judges for that Effect, yet the Lords of Justiciary being now of their Number, are the proper Judges, and both by the old and new Style of these Advocations that were raised, either by the Council or criminal Court, the Letters bear, That the Reasons are to be seen and considered by the Justices; and immediately upon the Advocation's passing, Caution is found in the Books of *Adjournal*, to answer before the Justices, and they have been in constant Possession of judging such Reasons of Advocation.

Follows

before the Justiciary Court. 21

Follows the Form of the Letters of Advocation.

GEORGE by the Grace of **GOD**, King
of Great Britain, France and Ireland, De-
fender of the Faith, To our Lovits

Macers, Messengers
at Arms, Our Sheriffs in that Part conjunctly
and severally, specially constitute, Greeting.
FORASMUCHAS it is humbly meaned and
shown to us by our Lovit *C. D.* **THAT**
WHERE the said Complainer is indicted and
accused before the Sheriff of — and his
Deputes, at the Instance of *A. B.* Procurator
Fiscal of the Sheriff Court, for his alledg-
ed having upon the — Day of — last by past, by
himself and others his Accomplices, theftu-
ously taken away and stollen considerable
Quantities of — belonging to — at least as
being guilty of Receipt of Theft, accessory, and
Art and Part of the said Crime; and which be-
ing found proven, the said Indictment concludes,
that the Complainer should be punished with
the Pains of Law. As the Double of the said
Indictment, containing a List of Witnesses and
Assysers Names and Designations, with a Copy
of Citation, subscribed by one of the Officers
of Court, produced, bears. In the which Try-
al and Indictment, the said Sheriff and his
Deputes intend to proceed, albeit he be most

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suspect of Iniquity, and noways Judge competent to the said Action, for the Reasons and Causes following. (Here the Reasons of Advocation are to be insert, and then say) Nevertheless, to convince our saids Lords of the Complainer's Innocency, he has already found sufficient Caution and Soverty, acted in our Books of Adjournal, to compear and abide his Tryal before our saids Lords: And therefore, The said Action and Cause ought to be advocate to our said Lords, as the only unsuspect Judges thereto, for the Reasons and Causes foresaid. **OUR WILL IS HEREFOR**E, and we charge you strictly, and command, that incontinent thir our Letters seen ye pass, and in our Name and Authority command and charge the said Sheriff of — and his Deputes, Procurator Fiscal and Clerk of Court, to compear before our said Lords Justice-general, Justice-clerk and Commissioners of Justiciary, within the Tolbooth or criminal Court-house of *Edinburgh*, the — Day of — next to come, bringing with them, the principal pretended Libel or Indictment, if any be raised, List of Witnesses and Assysers, hail Acts, and Minutes of Process, so far as they have proceeded therein, to be seen and considered by our said Lords; and to hear and see the samen advocate, and themselves and all other inferior Judges, discharged from
all

before the Justiciary Court. 23

all further trying, medling judging or cognoscing
in the said Cause. **ATTOUR**, we and our said
Lords Justice General, Justice Clerk and Com-
missioners of Justiciary, have advocated, and
hereby advocate the foresaid Action and
Cause from the said Sheriff and his Deputes,
Procurator-fiscal and Clerk of Court, to the
said Lords themselves, discharging hereby
the said Sheriff and his Deputes from all
further medling, trying, judging or cognosce-
ing in the said Cause, and of their Offices in
that Part, in the mean time, while the said
Day. And sic like, that ye in our Name and
Authority, command and charge, the Pro-
vost and Baillies of the Burgh of ———
to set the Complainer at Liberty, in Respect he
has found sufficient Caution, acted in our Books
of Adjournal for his Compearance, as said
is, * According to Justice. (Because ———
is become Cautioner for the Complainer's
Compearance, Day and Place, to the Effect,
and under the Pains contained in the Acts of
Parliament,) as ye will answer to us there-
upon. The which to do, we commit to you
conjunctly and severally our full Power, by

B 4

thir

*. And in Case the Crime to be advocate is Capital, then the Lords will not ordain the Prisoner to be libe-
rate, but under a sure Guard transported, and contain
a Warrant for that Effect.

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thir our Letters, delivering them by you duly execute and indorsed again to the Bearer. Given under our Signet, at *Edinburgh* the — Day of — and of our Reign the — Year, 17—

Ex deliberatione Dominorum Commissionariorum Justiciariorum.

J. D. Clerk.

These Letters pass upon a Bill signed by three Lords in Time of Vacance, and four in Time of Session. Before they are taken out, there is Caution found in the Books of Adjournal, for the Complainer's Compearance before their Lordships against a certain Day. This Advocation must be execute by a Macer or Messenger, and a full Copy of the Letters given to the Procurator Fiscal, Judge and Clerk. So soon as they are presented, and a Copy given in to the Court, the Judge ceases from determining any further therein, except it be remitted back to him again.

The *Saturday* before the Day of Compearance, the Letters of Advocation and Executions are given in to the Clerk of Court, and if no Person appear to prosecute the Complainer, when the Letters are called on the Day of Compearance, then the Lords desert the Dyet *Simpliciter*, and dismiss him from the Bar. Whereupon he takes Instruments,

before the Justiciary Court. 25

ments, and the Clerk writes the Interlocutor deserting the Dyet on the Back of the Advocation, and the *Prases* signs thereto.

But in case the Prosecutors compear, the Raiser of the Advocation, so soon as the Letters are called, enters the Pannel, and the *Prases* desires the Clerk to read the Letters, which being done, the Lawiers proceed to debate the Reasons of Advocation, and after the Debate is ended, then the Lords ordain both Parties to give in their Informations to the Clerk of Court, in order to be recorded.

After the Informations are recorded, the Lords proceed to determine the Relevancy, either advocating the Cause *in jure*, or remitting the same back to the Judge with Instructions; But if the Lords advocate *in jure*, then they ordain the Defender in the Advocation to prosecute the Action of new, and raise criminal Letters against the Advocater at any Time within the Space of Six Months, and the Complainer is obliged to find Caution to answer to any Libel that shall be raised against him, within the foresaid Space, and under the Pains contained in the Acts of Parliament, when the Crime isailable; but in case the Crime is Capital, there is a Warrant granted for detaining him in Prison, until he be liberate in due Course of Law, and the Pursuer ordained

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ed to prosecute him; and in case of Delay, he may apply for Letters of Intimation, and force his Tryal.

If the Criminal, whose Action the Lords have advocated to themselves, did dwell within the Lord of Regality his Jurisdiction, the Time of committing the Crime, the Lord of Regality, or his Depute, may compear before the Lords, and crave the Criminal to be repledged. For a Lord or Baillie of Regality may, in the Case of Crimes falling under his Cognizance, repledge from this Court an Offender dwelling within the Regality, that is, may crave him to be remitted to be judged in his Court upon Surety found by the Re-pledger to do Justice there within Year and Day, and by the Person repledged to appear there to underly the Law, for the Crime laid to his Charge. In which Case, the Re-pledger, if he fails to do Justice upon him in due Time, tines his Court for Year and Day. The Surety who borrowed the Criminal is liable to an Unlaw or Amercement, and the Lords of Justiciary (out of whose Hands he was taken) may proceed to try him*. But seldom or never the Lords allow any Lord or Baillie of Regality to re-pledge from the Court of Justiciary, (except in the Case of the Duke of

Argyle

*. *Quon. Attach. Cap. 1. and 17. Form of Baron Courts Cap. 25.*

before the Justiciary Court. 27

Argyle.) Indeed at the Circuit Courts, the Lords do indulge the Lords and Baillies of Regalities to sit with them, but seldom or never to re-pledge.

Criminals dwelling within any of the Isles of *Scotland*, except *Orkney* and *Zetland*, and a Part of the Isle of *Arran*, are, upon Application made in the Name of the Duke of *Argyle*, who is Hereditary Justice General in these Parts, remitted to be tryed by his Grace and his Deputies.

S E C T. V.

An Account of the judicial proceedings against capital Offenders upon their confessing the Crime in Judgment, with the whole Form thereto relating.

HIS Majesty's Advocate or his Deputies prepares an Indictment against the Person guilty of Murder, or any other Capital Crime, whereof the Tenor follows.

I N D I C T M E N T.

C. D. You are indicted and accused at the Instance of *A. B.* with Concourse of *D. F.* his Majesty's Advocate for his Highness

ness Interest, of the Crimes after-mentioned. **THAT WHERE,** by the Laws of GOD, and of this and every well governed Realm and Society, the Crimes of Murder are severely punishable, with all the Aggravations thereof and Tendencies thereto, particularly by Act of Parliament. — Yet true is and of Verity, that you the said *C. D.* shaking off all Fear of GOD, and Regard to the Laws, are Guilty, Actor, Art and Part of the foresaid Crime. **IN SO FAR AS** you, of your self, or with and by Accomplices, did masterfully, out of a murdering Design, and from a propense and premeditate Malice, ly in wait, upon the — Day of — and — Year, betwixt — and — in the Parish of — and County of — at the Place called — or near by that Place; and then and there, betwixt the Hours of — and — in the Night-time of the said Day, or upon one or other of the Days of the said Month and Year, or upon one or other of the Hours of the said Night, or Nights, of the said Day or Days, feloniously attack the Person of *E. F.* without any Manner of Provocation, and that as he was coming home to his own House, Family or Place of Residence; and then and there, or near by the said Place, you, of your self, or saids Accomplices, did Murder the said *E. F.* with a Durk, Poinard, or some other mortal Weapon, by thrusting the
the

before the Justiciary Court. 29

the same below his left Pap, opposite to his Heart, whereof he immediately died. And thereafter most inhumanly and barbarously did drag him to a Pond near by, where you of your self, or said Accomplices, threw the said *E. F.* in, on purpose to conceal your cruel and wicked Murder, and when missed and Search made, he was there found dead. **WHICH,** or any Part thereof, or your being Guilty, Actor, Art and Part of the said Crime, being found proven by the Verdict of an Assyse, before the Lords Justice General, Justice Clerk, and Commissioners of Justiciary, you ought to be punished with the Pains of Law, to the Example and Terror of others from committing the like in Time coming.

D. F.

Witnesses Names and Designations.

<i>A. B.</i> Merchant in <i>Edr.</i>		<i>G. H.</i> Merchant there
<i>C. D.</i> Merchant there		<i>H. I.</i> Merchant there
<i>D. F.</i>		

In all capital Crimes, the Facts are to be libelled, with the Hour, Day, Month or one or other of the Days of the said Month, Year of God, Place, and as guilty Art and Part, as in the above Form of Indictment; and sometimes particular Facts and Circumstances are libelled for presuming and in-

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infering the Guilt. And if the Crime be contrary to any Statutory Law, the ſaid Statute muſt be libelled, and all Indictments may conclude with the Pains of Law.

The Indictment, with the Liſt of Witneſſes thereto ſubjoined for proving the Crime, is made up by his Majeſty's Advocate or his Deputes. If there is any private Party, the Indictment muſt make mention thereof, and the Indictment with the Liſt of Witneſſes is ſigned by him or his Depute, and thereafter given into the Clerk of Court, in order to prepare a Bill for Letters of Diligence paſſing their own Signet, for the Priſoner's Compearance before the ſaid Lords againſt *a certain Day*; in order for his Trial; alſo for citing Witneſſes and Aſſizers to the ſame Day.

The Bill of which Letters is ſigned by the Advocate, and paſt by one Lord; and the Advocate names the Day of Compearance, and the Deliverance on the Bill, is, *Fiat ut petitur*, to the — Day of — next to come, and this Blank is filled up with the ſame Day to which the Diligence is taken out, and the Bill is ſigned by the Clerk on the Back. There is alſo at the ſame Time a Liſt of Aſſizers, conſiſting of Forty five Perſons, preſented and ſigned by Four Lords in time of Seſſion, and three in time of Vacance.

If

before the Justiciary Court: 31

If the Person guilty be a Gentleman holding of the Crown, the one half of the Forty five Assizers must be landed Men.

When the Indictment is to be given to the Prisoner, it must be all doubled, * with a List of the Witnesses and Assizers Names and Designations, and Judges Names signing the Assize, with a short Copy by way of Charge given by the Macer or Messenger to the Prisoner. This Indictment is execute upon Fifteen free Days (which are commonly called in Terms of Law, the *Induciae Legales*) after Citation for the Prisoner's Comparance before the said Lords.

Follows the Form of the Diligence for citing the Prisoner, Witnesses and Assizers.

GEORGE by the Grace of **GOD**, King of Great Britain, France and Ireland, Defender of the Faith, To our Lovits

Macers, Messengers at Arms, Our Sheirffs in that Part conjunctly and severally, specially constitute, Greeting. **FOR ASMUCHAS**, it is humbly meaned and shown to us, by our Trusty *D. F. Esq;* our Advocate for our Interest, and *A. B. Merchant* in— That where, the—Day of—next to come, is appointed for the Trial and Examination of *C. D.* Prisoner in the Tolbooth of *Edinburgh*,
for

*Act of Regulation of the Justice Court 1672, Act 3. & 11.

for the Crime of Murder, committed by him ;
 in Manner mentioned in the Indictment raised
 at the Complainers Instance against him there-
 anent. Therefore necessary it is for the Com-
 plainers to have our Warrant and Dili-
 gence for summoning the said C. D. to
 compear before our Lords Justice General,
 Justice Clerk and Commissioners of Justiciary,
 within the Tolbooth or criminal Court-House
 of *Edinburgh*, the said — Day of — next to
 come, in the Hour of Cause, there to underly
 the Law for the Crime foresaid ; and also
 for citing Witnesses and Assizers in Manner
 underwritten. **OUR WILL IS HERE-**
FORE, and we charge you strictly and
 command, That incontinent thir our Letters
 seen ye pass, and in Our Name and Authority,
 Summon, Warn and Charge the said C. D.
 to compear before our said Lords Justice
 General, Justice Clerk and Commissioners of
 Justiciary, within the Tolbooth or Criminal
 Court House of *Edinburgh*, the said — Day
 of — next to come, in the Hour of Cause,
 there to underly the Law for the Crime foresaid,
 That being convict thereof, Justice may be admi-
 nistrate upon him, conform to the Laws of this
 Realm ; And also, That ye summon an Assize
 hereto, not exceeding the Number of forty-
 five Persons, together with such Witnesses
 who best know the Verity of the Premises,
 whose

before the Justiciary Court. 33

whose Names shall be given you in List subscribed by the said Complainers, or any of them, to compear before our said Lords, Day and Place foresaid, the said Persons of Inquest, to pass upon his Assize, and the said Witnesses to bear leal and soothfast witnessing, in so far as they know or shall be speired at them, anent the said C. D. his Guiltiness of the Crime foresaid; ilk Assizer and Witness under the pain of 100 Merks. According to Justice, as ye will answer to us thereupon; the which to do, we commit to you conjunctly and severally our full Power by thir our Letters, delivering them by you duly execute and indorsed again to the Bearer. Given under our Signet at *Edinburgh*, the — Day of — and of Our Reign the — Year 17

Ex deliberatione Dominorum Commissionariorum Justiciariorum.

J. D. Clerk.

These Letters are signet with their own Seal.

Follows the Form of the Copy given to the Prisoner.

I *J. G.* One of the Macers to the Justiciary Court, by Vertue of Letters of Diligence raised at the Instance of *A. B.* with Concourse of *D. F.* his Majesty's Advocate for his Highness Interest, against *C. D.* Prisoner in the Tolbooth of *Edinburgh*, in his Majesty's Name and Authority,

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thority, summon, warn and charge you, the said *C. D.* to compear before the Lords Justice General, Justice Clerk and Commissioners of Justiciary within the Tolbooth, or Criminal Court House of *Edinburgh*, the — Day of — next to come, in the Hour of Cause, there to underly the Law for the Crime of Murder, committed by you, in Manner mentioned in the Indictment raised against you thereanent, to the Effect that being convict thereof, Justice may be administrate against you, conform to the Laws of this Realm. This I do, conform to the principal Letters of Diligence, which are dated and signet at *Edinburgh*, the — Day of — Of the which principal Indictment, with a List of the Assizers Names and Designations that are to pass upon your Assize, and a List of the Witnesses Names and Designations that are to be adduced against you, I herewith give you a just and exact Copy, upon this — Day of — and — Year, before these Witnesses, * * * *

Ex deliberatione Dominorum Commissionariorum Justiciarum.

J. G. Macer.

Follows the Form of the Execution returned against the Prisoner.

Upon the — Day of — and — Year, I *J. G. Macer* to the Justiciary Court, past at Com-

before the Justiciary Court. 35

Command of Letters of Diligence raised at the Instance of *A. B.* with Concourse of *D. F.* his Majesty's Advocate for his Highness's Interest, against *G. D.* Prisoner in the Tolbooth of *Edinburgh*, and by Vertue thereof, in his Majesty's Name and Authority summoned, warned and charged the said *C. D.* to compear before the Lords Justice General, Justice Clerk and Commissioners of Justiciary, within the Tolbooth or Criminal Court House of *Edinburgh*, the — Day of — next to come, in the Hour of Cause, there to underly the Law for the Crime of Murder committed by him, in Manner mentioned in his Indictment raised against him thereanent, to the Effect, that being convict thereof, Justice might be administrate upon him, conform to the Laws of this Realm. This I did, (after the Form and Tenor of the said Letters of Diligence in all Points, which are dated and signet at *Edinburgh*, the — Day of —) by delivering to the said *C. D.* personally apprehended within the said Tolbooth, a full Double of the said Indictment, with a List of the Assizers Names and Designations that are to pass upon his Assize, and a List of the Witnesses Names and Designations that are to be adduced against him, with a short Copy subjoined thereto subscribed by me; Which Copy did contain the Day and Date hereof, Witnesses Names and Designations therein insert, present

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thereat, and hereto subscribing, viz. * * *
and * And for the more Verification here-
of, I and the said Witnesses have subscribed
the same.

J. G. Macer.

*Follows the Form of the Copy given to each of
the Witnesses in the Indictment.*

I J. G. Macer to the Justiciary Court, by
Vertue of Letters of Diligence raised at the In-
stance of *A. B.* with Concourse of *D. F.* his
Majesty's Advocate for his Highness Interest,
against *C. D.* Prisoner in the Tolbooth of
Edinburgh, in his Majesty's Name and Au-
thority, summon, warn and charge you —
to compear before the Lords Justice General,
Justice Clerk and Commissioners of Justiciary,
within the Tolbooth or Criminal-Court House
of *Edinburgh*, the — Day of — next to
come, in the Hour of Cause, to bear leil
and soothfast witnessing, in so far as you
know, or shall be speired at you, anent the said
C. D. his Guiltneſs of the Crime libelled a-
gainst him, under the Pain of 100 Merks.
This I give you upon this — Day of — and
— Year, before these Witnesses. * * * and *.

*Ex deliberatione Dominorum Commissionari-
orum Justiciarum.*

J. G. Macer.
Follows

before the Justiciary Court. 37

Follows the Execution upon summoning of the Witnesses.

Upon the — Day of — and — Year, I
J. G. Macer to the Justiciary Court, past at
Command of Letters of Diligence raised at the
Instance of *A. B.* with Concourse of *D. F.* his Ma-
jesty's Advocate for his Highness Interest, against
C. D. Prisoner in the Tolbooth of *Edinburgh*, and
by Vertue thereof, in his Majesty's Name and
Authority summon'd, warn'd and charged * * *
and * to compear before the Lords Jus-
tice General, Justice Clerk and Commissioners
of Justiciary, within the Tolbooth or Crimi-
nal-Court House of *Edinburgh*, the — Day of
— next to come, in the Hour of Cause,
to bear leil and soothfast witnessing, *in so
far as they know*, or shall be speired at them,
anent the said *C. D.* his Guiltiness of the Crime
libelled; ilk one of the said Witnesses under
the Pain of 100 Merks. This I did, conform
to the said Letters of Diligence in all Points,
which are dated and signet at *Edinburgh*, the
— Day of —, by delivering to the said
* * * and * a short Copy subscribed by
me (all personally apprehended) and by leaving
to the said * * and * a short Copy sub-
scribed, by me within each of their Dwelling
Houses, with their Wives or Servants, be-
cause I could not get them personally appre-
hended. All which Copies did contain the

Days and Date hereof, Witnesses Names and Designations therein insert, present thereat and hereto subscribing. Before these Witnesses, *G. D. A. B.* and *B. D.* and for the more Verification hereof, I and the said Witnesses have subscribed the same. *J. G. Macer.*

Follows the Form of the Copy given to an Assizer.

I *J. G. Macer* to the Justiciary Court, summon you — to compear before the Lords Justice General, Justice Clerk and Commissioners of Justiciary within the Tolbooth or Criminal Court House of *Edinburgh*, the — Day of — next to come, in the Hour of Cause, to pass upon the Assize of *A. B.* Prisoner within the Tolbooth of *Edinburgh*, under the Pain of 100 Merks. This I give you upon the — Day of — and — Year *J. G. Macer*

The Macer returns an Execution after this Manner.

Upon the — Day of — and — Year, we Macers to the Justiciary Court, summon'd, warn'd and charged, the Persons aftermentioned, to compear before the Lords Justice General, Justice Clerk and Commissioners of Justiciary, within the Tolbooth or Criminal-Court House of *Edinburgh*, the — Day of — next to come, in the Hour of Cause, to pass upon the Assize of *A. B.* each under the pain of 100 Merks, *viz.*

per son

before the Justiciary Court 39

Personally apprehended.

G. H. Bookfeller in Edinburgh,

A. B. Merchant there,

J. D. Bookfeller there,

J. C. Wright there,

W. B. Bookfeller there,

D. D. Merchant there,

J. L. Smith there,

J. C. Wright there,

D. C. Merchant there,

W. D. Merchant there,

A. D. Merchant there,

W. B. Merchant there,

A. B. Baxter there,

W. C. Merchant there,

W. G. Wright there,

W. G. Vintner there,

G. W. Glaſer there,

G. G. Litſter there,

F. G. Merchant there,

G. B. Smith there,

W. K. Baxter there,

P. R. Merchant there,

W. G. Smith there,

J. C. Vintner there,

Copies left at their Dwelling-Houſes

H. C. Merchant in Edinburgh,

W. M. Copper-Smith there,

W. L. Copper-Smith there,

N. L. Merchant there,

K. M. Gold-Smith there,

J. J. Jeweler there,

J. A. Merchant there,

J. P. Bookfeller there,

G. C. Merchant there,

J. W. Wright there,

J. W. Vintner there,

A. H. Merchant there,

R. B. Vintner there,

G. H. Wright there,

D. F. Merchant there,

W. H. Baxter there,

A. E. Merchant there,

A. D. Smith there,

H. C. Merchant there.

A. A. Copper-Smith there,

W. W. Merchant there

J. G. Macer,

*H. C. }
J. P. } Macers.*

C 4

Frid.

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Friday or Saturday before the Day of Compearance, the Advocate or his Deputes, give in the Indictment, with the Execution thereof against the Pannel, the Executions against the Witnesses and Assizers, to the Clerk of Court, in case the Prisoner's Doer call for them, in order to prepare his Objections against the same, and take them up upon Receipt, and the Indictment with the Executions, ought to be lodged 24 Hours before Calling, and Rolls of Dyets are given by the Clerk to the Lords on the Saturday before the Court meet.

If the Prisoner is poor and has nothing to consult Lawiers with, and if this is suspected by the Judges, they cause notifie or intimate to him to apply to them for Lawiers to make his Defence either before or at his Compearance. Then he applies by Petition to the Lords for Lawiers to plead in his Defence, which the Lords name, and serve the Advocates named with a Double of the Petition and Interlocutor for their Warrant. This Petition must be given in some few Days before the Day of Compearance, that his Lawiers may have Time to consider the Indictment, or if the Prisoner, thro' Ignorance, come unprepared of Lawiers, the Lords *ex nobile officio*, ordain Lawiers to appear for the Prisoner; as also *gratis* Warrands are granted

before the Justiciary Court. 41

ted to Prisoners, that Clerks, Macers and others may serve without Fee, for bringing their Suits to a Conclusion.

When the Day of Compearance comes, before the Court meet, the Assizers Names and Designations are called by the Clerk, and marked present, the Prisoner is sent for by a Macer of Court in his Gown, displaying his Mace, and is brought in to the Court-house before the Lords come to the Bench, and enters the Pannel (after this the Prisoner is called *Pannel*.) And if the Prisoner is a Person of Distinction, he is allowed six Friends to stand by him while Pannel, and the Pursuer four *.

And the Clerk of Court, when the Lords come to the Bench, writes in the Book the *Sederunt* of the Judges present, viz.

*Curia justiciarum S. D. N. Regis, tenta in
prætorio burgi de Edinburgh — die mensis
— anno domini — per nobilem & poten-
tem comitem — justiciarium generalem
& honorabiles viros — justiciarium cle-
ricum dominos — — — — — &
— commissarios justiciarum dict. S. D. N.
regis. Curia legitime affirmata.*

Thereafter the Clerk writes in his Book
Intran. That is, the Prisoner enters into the Pannel.
C.

*. Act 82. Par. 14. Ja. II. Act 41. Par. 2. M. Act
140. Par. 8. Ja. V.

C. D. indicted and accused at the instance of *A. B.* with Concourse of *D. F.* his Majesty's Advocate for his Highness Interest, as guilty of the Crime of Murder, committed by him, in Manner mentioned in his Indictment raised against him thereanent.

The Macer by Order of Court commands Silence, and the Preses orders the Pannel's Indictment to be read. After reading, the Preses asks the Pannel, what he has to say to his Indictment; If he confess, then his Confession is immediately wrote on the Back of the Indictment, and signed by him and the Preses, in Presence of the Assize, whereof the Tenor follows.

Edinburgh the — Day of — and — Year. In Presence of the Lords Justice General, Justice Clerk and Commissioners of Justiciary and Assizers, sitting in Judgment, compeared *C. D.* Pannel, and judicially acknowledged and confessed, that he is guilty of the Crime as libelled in the within Indictment.

C. D.

A. C. I. P. D.

But in case the Pannel, at the Time of his judicial Confession, be lookt upon to be any ways disordered in his Judgment, whereby he may prejudge himself in his Life and Fortune, the hail Accusation, Reasoning, Writes, Wit-
nesses,

before the Justiciary Court. 43

nesses, and other Probation and Instruction whatsoever of the Crime, are alledged, reasoned and deduced to the Assize, in Presence of the Party accused, in Face of Judgment, and no otherways, that the accused be not taken *pro confesso*, and the Party prejudged in any Sort, before he be convicted by lawful Tryal.

If his Majesty's Advocate and private Party decline leading or adducing any other Proof than the Pannel's judicial Confession, and the Lords are satisfied with the Firmness of the Pannel's Judgment as to the same, then they give their Interlocutor on the Relevancy of the Indictment, in the Terms following,

The Lords Justice General, Justice Clerk and Commissioners of Justiciary, having considered the Indictment pursued at the Instance of *A. B.* with Concourse of *D. F.* his Majesty's Advocate for his Highness Interest, against *C. D.* Pannel, with the Pannel's judicial Confession, they find the Indictment, as libelled, relevant to infer the Pains of Law. And remit the Pannel and Indictment to the Knowledge of an Assize.

A. C. I. P. D.

The Preses signs the Interlocutor, and adds *I. P. D.* that is, in *presentia dominorum*, in Presence of the Lords, and the Clerk reads it to the Pannel in Presence of the Assize.

After

After reading of the Interlocutor, the Preses calls for the List of Assize from the Clerk, and Marks 15 out of the 45 Assizers, and orders the Clerk to call them five by five, and in the mean time the Clerk writes their Names in the Book; and turning about to the Pannel, the Preses asks the Pannel, If he has any Thing to object, why these five Assizers may not pass upon his Assize, and so to the rest, and the Pannel having nothing to object, the Assizers turn about to the Lords, and the Clerk swears them after this Manner.

You five swear, That you shall Truth say, and no Truth conceal, in so far as you are to pass upon this Inquest, as you shall answer to GOD at the Great Day. This Oath is sworn by them, holding up their Right Hand.

If the Pannel has any Objections against the Assizers, the Pannel's Procurators propone the same before they are sworn; but where the Pannel confesses his Crime, there is never any Objection made against them.

If any of the Assize be absent, the Advocate may crave them to be unlauded for not attending, and the Lords may order them to be called, and if they do not answer to their Names, and are personally apprehended, the Court will unlaue them, which the Clerk pronounces to the Macer thus,

The

before the Justiciary Court. 45

The Court shaws for Law, that *A. B.* and *C. D.* and each of them, are in an Unlaw and Amerciament of 100 Merks, for not com-
pearing to pass upon this Assize, as they who
were lawfully cited for that Effect.

A. C. I. P. D.

After the Assize are sworn, there is
Room made for them; and the Clerk inserts
in the Book the Assizers Names thus.

A S S I Z E.

<i>A. C.</i> Merchant in <i>Edr.</i>	<i>C. D.</i> Smith in <i>Edr.</i>
<i>H. J.</i> Merchant there,	<i>D. B.</i> Baxter there,
<i>J. K.</i> Brewer there,	<i>H. F.</i> Wright there,
<i>D. A.</i> Vintner there,	<i>J. C.</i> Wright there,
<i>S. A.</i> Merchant there.	<i>J. D.</i> Smith there.

B. D. Merchant in *Edr.*
C. E. Gun-Smith there,
S. A. Peutherer there,
T. M. Wig-maker there,
H. A. Wright there.

After the fifteen Assizers are sworn, Inti-
mation is made by the Macer, at the Desire
of the Lords, that the rest of the Assizers may
go away.

Thereafter the Clerk writes in the Book,
The

The Affize all lawfully sworn, and no Objection of the Law in the contrary, the Pursuer, for Probation, adduces the Pannel's judicial Confession on the Back of the Indictment.

Then the Lord Advocate, or Depute, addresses the Affize, telling them, That they having heard the Indictment, with the Pannel's judicial Confession, and the Lords Interlocutor, they are to consider the same, and return their Verdict accordingly. Thereafter the Lords ordain the Affize to inclose, which the Clerk pronounces to the Macer, after this Form.

The Lords Justice General, Justice Clerk and Commissioners of Justiciary, ordain the Affize to inclose in this Place presently, and return their Verdict To-morrow at Twelve a Clock, and the hail Fifteen to be present, each under the Pain of 100 Merks, and the Pannel to be carried back to Prison.

Thereafter the Preses orders the Macer to intimate to the fifteen Assizers, not to remove out of the Court House, till their Verdict is written and sealed, which if any do, nothing can be done till they return. Before inclosing of the Affize, the Clerk leaves a *Formula* with them for their Direction; and whatever is wanting is got to them; such as Meat, Drink, Paper, Pens, Ink, Candles and Wax. And the Clerk of Court, nor no other Person can
be

before the Justiciary Court. 47

be present with the Assize, after they are inclosed. Then the Macer closes them in, by locking the Door on them, so that none of the fifteen must look over a Window, or speak to any Person, before they have agreed to their Verdict; which if they do, and can be proven, then the Pannel will plead to be assailed. *Vide Act, Ja. VI. Parl. 11. Cap. 91.*

The Assize being inclosed, and having chosen a Chancellor and Clerk of their own Number, and having agreed all in one Voice, or by Plurality of Voices, that the Indictment is proven, in the Terms of the Pannel's Confession, then they write their Verdict, which is sealed with the Chancellor or Clerk's Seal, directed, *To the Right Honourable the Lords Justice General, Justice Clerk and Commissioners of Justiciary at Edinburgh*; and is kepted by him, till the Court meet. When this is done, they call to the Macer (who is attending) to open the Door; for all is ended, and their Verdict sealed. Then he opens the Door, and lets them out.

The Day thereafter, the Court again meeting, the Clerk inserts the *Sederunt* of the Judges present in the Book, *viz.*

Curia justiciarum S. D. N. Regis, tenta in praetorio burgi de Edinburgh — die mensis — anno domini — per nobilem & potentem comitem — justiciarium generalem, & honora-

*honorabiles viros — justiciarium clericum
dominos — & — commissarios
justiciarii dict. S. D. N. regis.*

Curia legitime affirmata.

Intran.

A. B. indicted and accused, *ut in die praecedenti.*

The Persons who past upon the Assize of the said Pannel returned their Verdict in Presence of the said Lords. The Lords being set in Judgment, call for the Chancellor of the Assize, to give in their Verdict; but before opening of the same, the Preses desires the Clerk to call the fifteen Assizers, to answer to their Names: And if any be absent, the Lords fine them in 100 Merks, for not attending, in giving in of the Verdict. The Form of the Unlaw is as follows.

The Court shaws for Law, that *A. B.* and *C. D.* are in an Unlaw and Amerciament of 100 Merks, for not attending in giving in of the Verdict.

A. C. I. P. D.

The Lords delay opening of the Verdict, till they be all present, in case any Mistake should happen therein: And in case of any Informality, the Lords may inclose the Assize again; but if all are present, then the Lords open the Verdict, and read the same; whereof the Tenor follows.

ASSIZE.

*A. C. I.
H. J.
J. K.
D. A.
S. A.*

*Ed
Years
chool
K. to
the
A. B.
Adv
C. L.
Justi
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nel's
Voic
own
Libe*

A S S I Z E.

<i>A. C. Merchant in Edr.</i>	<i>C. D. Smith in Edr.</i>
<i>H. J. Merchant there,</i>	<i>D. B. Baxter there,</i>
<i>J. K. Brewer there,</i>	<i>H. F. Wright there,</i>
<i>D. A. Vintner there,</i>	<i>J. C. Wright there,</i>
<i>S. A. Merchant there.</i>	<i>J. D. Smith there.</i>

B. D. Merchant in Edr.
C. E. Gun-Smith there,
A. S. Peutherer there,
T. M. Wig-maker there,
H. A. Wright there.

Edinburgh, the — Day of — 17 —
 Years, the above Assize having inclosed, did
 choose *H. J.* to be their Chancellor, and *J.*
K. to be their Clerk, and having considered
 the Indictment pursued at the Instance of
A. B. with Concourse of *D. F.* his Majesty's
 Advocate, for his Highness Interest, against
C. D. Pannel, the Lord Justice General,
 Justice Clerk and Commissioners of Justicia-
 ry their Interlocutor thereon, with the Pan-
 nel's judicial Confession; they all in one
 Voice, Find (*Here the Assize inserts their*
own Words, or Words to this Purpose) the
 Libel proven, in the Terms of the Pannel's
 D own

own judicial Confession. In Witneſs where-
of thir Presents are ſubſcribed, by our ſaid
Chancellor and Clerk, in our Names, Place
and Date foreſaid.

H. J. Chancellor.

I. K. Clerk.

When the Fifteen Aſſizers do return their
Verdict upon a Pannel's Confession, it is
thought very proper, the Aſſize ſhould repeat
the Confession as emitted.

After the Lords have opened the Verdict
and read it, they give it to the Clerk, to in-
ſert in the Book; and after the Verdict is
written therein, then the Lords deſire the
Clerk, to read the Verdict to the Pannel, in
Preſence of the Court; and after reading there-
of, to ſeal up the Verdict, with the Chancel-
lor's or Clerk's Seal.

The Lords delay pronouncing of Sentence
againſt the Pannel, till *Monday* next at Nine
a Clock, and ordain the Pannel to be carried
back to Priſon till that Time.

When the Court again meets, the Clerk
inſerts the *Sederunt* as follows, viz.

*Curia juſticiarum S. D. N. Regis, tenta in præ-
torio burgi de Edinburgb — die menſis
— anno domini — per nobilem & poten-
tiori comitem — juſticiarium generalem, &
bono-*

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*honorabiles viros — justiciarium clericum
dominos — & — commissionarios
justiciarii dict. S. D. N. regis.*

Curia legitime affirmata.

Intran.

A. B. indicted and accused, *ut in die præ-*
cedenti.

The Copy of the Verdict being read out of the Book, the Preses resumes the Verdict, and asks their Lordships Opinion thereon.

And after their Opinion is given, the Dempster of Court is sent for, if he be not attending, and the Lords order the Clerk to write the Sentence in the Book. After it is written and read by the Lords, they all sign the same, whereof the Tenor follows.

The Lords Justice General, Justice Clerk and Commissioners of Justiciary, having considered the Verdict of Assize, returned upon the — Day of — Instant against *C. D.* Pannel; whereby it is found proven, he is guilty of the Murther of *E. F.* Therefore the said Lords, by the Mouth of *L. M.* Dempster of Court, decern and adjudge the said *C. D.* to be taken upon *Wednesday*, being the — Day of — next to come, from the Tolbooth of *Edinburgh*, to the *Grass Market* thereof; and there, betwixt the Hours of two

and four of the Clock in the Afternoon, to be hanged by the Neck, on a Gibbet, until he be dead. And ordain all his moveable Goods and Gear to be Escheat, and inbrought to his Majesty's Use, which is pronounced for Doom.

And, by an Act passed in the Eleventh Year of the Reign of his late Majesty King George I. intituled, *An Act for the more effectual disarming the Highlands, in that Part of Great Britain called Scotland*, it is enacted, That from and after the First Day of June 1725, no Sentence or Judgment of any Civil Magistrate, or Court of Judicature, importing a capital or corporal Punishment, if pronounced in *Edinburgh*, or any other Part of *Scotland*, to the southward of the Firth or River of *Forth*, should be put in Execution, within less than Thirty Days, after the Date of such Sentence; and if pronounced in any Place of the northward of the said Firth or River of *Forth*, should be put in Execution in less than Forty Days, after the Date of such Sentence.

And, by an Act past in the Third Year of King George II. narrating, That whereas the Maintenance and Securing in Goals all Criminals convicted and adjudged to suffer any corporal Punishment, for so many Days after Judgment given, hath been found burthensome to Burghs, and other

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other his Majesty's Subjects, and a Discouragement to the apprehending and punishing of Offenders; it is enacted, That from and after the Twenty fourth Day of *June* 1730, it shall and may be lawful to and for all the said Magistrates and Courts of Judicature, to put in Execution any Judgment or Sentence importing any corporal Punishment less than Death, or dismembring, if given or pronounced in any Part of *Scotland*, to the southward of the Firth or River of *Forth*, after the elapsing of Eight Days, and if given or pronounced in any other Place, to the northward of the said Firth or River of *Forth*, after the elapsing of Twelve Days, from and after the Date of such Judgment or Sentence respectively.

Provided always, That it shall and may be lawful to and for the Judges of the Court of Justiciary, or any of them, who are hereby severally authorized, and required upon Application made, and a reasonable Cause shown to him or them, by any Person or Persons who shall find themselves aggrieved, by any such Sentence or Judgment, given or pronounced by any Court of Regality, or other inferior civil Magistrate or Court of Judicature, to stay all Execution of such Judgment or Sentence, for the Space of Thirty Days, to the End, that such Application may be made for Re-

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drefs, as is agreeable to the Laws of that Part of *Great Britain* called *Scotland*.

In caſe the Criminal be a Nobleman or Gentleman holding of the Crown, ordinarily the Sentence runs thus, *To have his Head ſe- vered from his Body*, which of old was by a Sword, or an Ax; but now by a Machine, or Inſtrument called the *Maiden*.

And in caſe of notorious Criminals, ſuch as Paricides, notorious Murtherers, Robbers, Houſe-breakers, going under the Name of *Egyptian* Vagabonds and Sorners, &c. they are ſenten- ced to be hung in Chains, and generally at the Place where theſe Crimes are committed, to be publick Examples *in terrorem*. But in Caſes of Beaſtiality, the Criminal and the Brute, with whom it is committed, are generally ſtiffled with a Rope, and thereafter burnt, in the Morning before Sun riſing: As alſo Witches, &c.

The foregoing Sentence is pronounced by the Clerk, to the Dempſter, and by the Dempſter to the Pannel. And when the Clerk pro- nounces the Sentence to the Dempſter, he does it after this Manner.

For ſameikle as, by the Verdict of an Aſſize returned againſt you *C. D.* Pannel, it is found proven, That you are guilty of the Murther of *E. F.* Therefore the Lords Juſtice Gene- ral,

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ral, Justice Clerk and Commissioners of Justiciary, and I, in their Name, decern and adjudge you the said *C. D.* to be taken upon *Wednesday*, being the — Day of — next to come, from the Tolbooth of *Edinburgh* to the *Grass Market* thereof, and there, betwixt the Hours of two and four of the Clock in the Afternoon, to be hanged by the Neck on a Gibbet, until you be dead. And ordain all your moveable Goods and Gear to be Escheat, and inbrought to his Majesty's Use. And this I give for Doom. God save the King.

A Woman with Child, convicted of a capital Crime, is allowed to plead her Belly, for obtaining a Delay of Sentence against her; upon which the Lords grant Warrant to cite Midwives to compear and try, whether she be with Child or not, who compearing are sworn, and remove out of Court to another Room with the Pannel; and after some little Time re-enter into the Court, and give their Opinion in the Matter referred to them; according to which the Lords proceed, or delay to give Sentence.

After pronouncing of the Sentence, the Pannel is carried back to Prison, therein to remain until the Day of his Execution: And a Warrant is immediately wrote out by the Clerk, and signed by the Judges, for the Magistrates

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gistrates of *Edinburgh*, to see the said Sentence put in Execution, as they will be answerable on their highest Peril; and ordered to be given to the Magistrates: Whereof the Tenor follows,

For sameikle as, by the Verdict of an Assize returned against *C. D. Pannel*, it is found proven, that he is guilty of the Murther of *E. F.* Therefore he is by us the Lords Justice General, Justice Clerk and Commissioners of Justiciary, decerned and adjudged to be taken upon *Wednesday*, being the — Day of — next to come, from the Tolbooth of *Edinburgh* to the *Grass Market* thereof, and there, betwixt the Hours of two and four of the Clock in the Afternoon, to be hanged by the Neck on a Gibbet, until he be dead. We ordain the Magistrates of *Edinburgh*, to see the said Sentence put in Execution, as they will be answerable on their highest Peril. Given at *Edinburgh* the — Day of — 17 — Years. This is termed *the dead Warrant*.

Follows the Form of old, in executing an Indictment of Treason.

If the Crime was Treason, the Indictment of old used to be given to the Criminal by *Heralds*

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ralds and Pursuevants and Trumpeters in their Coats, who sound all the Way, from the Criminal Court-house to the Prison Door, which is immediately opened, and with open Doors, they sound three Times, then enter and sound all the Way till they come to the Criminal's Apartment, and there sound three Times, before giving Indictment, and thereafter sound the whole Way back again.

In case, the treasonable Person is absconded, and not in Custody, then he receives Sentence of Fugitation; and the Heralds and Pursuevants carry several Copies of his Armorial Bearings (after tearing severals of them in the criminal Court House) to the Cross of *Edinburgh*, with Trumpets sounding the whole Way, and ascend the Cross, and sound three times: And thereafter one of the Heralds promulgates the Sentence, read by the Clerk of the Court or Depute, he and all the rest being bare-headed; and then tear several more of the Armorial Copies, or Bearings of the Rebel; and then batter on the Cross the said Armorial Bearing reversely, which is the Top or Chief of the Shield undermost; and return from whence they came, the Trumpets sounding all the Way.

This was the ancient Form before the uniting of the two Kingdoms, and the Act of *Oyer* and *Terminer's* Commencement.

SEC.



S E C T. VII.

*An Account of the Judicial Proceedings
against Capital Offenders, who stand
Trial upon the Probation to be addu-
ced against them, and the Way and
Manner of Forcing their own Trials,
conform to the Sixth Act of Parliament,
K. Wm. 1701.*

THE Person being apprehended and im-
prisoned, for any capital Crime, and
perhaps innocent, as to the Crime laid to his
Charge; if he is conscious of his Innocence,
or of the Defect of the Probation against him,
he may force his Trial, by giving in a Petition
to any of the Lords of Justiciary (with an
Extract of the Warrant of Commitment, sign-
ed

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ed by the Keeper of the Prison, expressing the alledged Cause or Crime, for which he is imprisoned) craving Precepts or Letters of Intimation, for intimating to his Majesty's Advocate, or Party appearing by the Warrant to be concerned, to fix a Day for his Trial, within Sixty Days next after the Intimation, under the Pains and Certifications contained in the Act of Parliament 1701. Whereof the Tenor follows.

Act for preventing wrongous Imprisonment, and against undue Delays in Trials, January 31. 1701.

OUR Sovereign Lord, Considering it is the Interest of all his good Subjects, That the Liberty of their Persons be duly secured; And that it is declared by the Claim of Right, that the Imprisonment of Persons, without expressing the Reasons thereof, and delaying to put them to Trial, is contrary to Law.

Therefore his Majesty, with Advice and Consent of the Estates of Parliament, Statutes, Enacts and Ordains, That all Informers shall sign their Informations, and that no Person shall hereafter be imprisoned for Custody, in order to Trial for any Crime or Offence, without a Warrant in Writ, expressing the particular

cular Cause for which he is imprisoned ; and of which Warrant, the Messenger or Executor thereof, before Imprisonment, or the Keeper of the Prison, receiving the same, is hereby ordained to give a just Double immediately under his Hand to the Prisoner himself, for the End afterspecified :

Declaring, That all Warrants for Imprisonment, on the Account aforesaid, either proceeding upon Informations not subscribed, or not expressing the particular Cause, shall be void and null, and the Judge or Officer of the Law, and all others whatsoever subscribing the same, and the Executor or Keeper of the Prison, who shall receive and detain the Person so wrongously ordered to be imprisoned, or refusing a Double as said is, shall be liable in the Punishment of wrongous Imprisonment hereafter exprest.

And to the Effect that Persons who are or shall be imprisoned for Custody in order to Trial, may not be wrongously delayed and detained, His Majesty, with Advice and Consent foresaid, Statutes and Ordains, That all Crimes not infering capital Punishment, shall beailable.

And for clearing and establishing the Method of finding Bail, in such Cases, either before or after Imprisonment, His Majesty, with Advice and Consent foresaid, Statutes and Ordains

before the Justiciary Court. 61

dains, That it shall be lawful to the Prisoner, or Person ordered to be imprisoned, to apply to the Committer or Commissioners of Justiciary, or other Judge competent for Cognition of the Crime, and offer to find sufficient Caution, that he, the said Prisoner, or Person ordered to be imprisoned, shall appear and answer to any Libel that shall be offered against him, for the Crime or Offence wherewith he is charged, or at any Time within the Space of six Months, and that under such a Penalty, as the said Committer, or the Lords of Justiciary, or other Judge competent, shall modify and appoint.

And that upon the said Application, the said Committer, or Lords of Justiciary, or other Judge competent, shall first cognosce, whether the Crime be capital or not, in order to the finding Bail allenary; And if found bailable, then he or they shall be obliged to modify the Sum for which the Bail is to be found, within 24 Hours after the said Petition is presented to him or them respectively, the Sum for which the Bail is to be found not exceeding 6000 Merks for a Nobleman, 3000 Merks for a landed Gentleman, 1000 Merks for any other Gentleman and Burgeßs, and 300 Merks for any other inferior Person, under the Pain of wrongous Imprisonment.

And

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And upon the Parties finding sufficient Bail, under the Penalty modified at the Sight of the said Judge or Judicatory *respective*; and delivering or offering the same to the Clerk, and Instruments taken upon the Delivery, or Offer of sufficient Caution, the said Committer or Judicatory competent shall order his Liberation, or discharge his Imprisonment, if not incarcerate, under the Penalty of wrongous Imprisonment.

As likewise that sufficient Bail, under the Penalty modified, being offered to the Judge or Magistrate, to whom the Execution of the Warrant is directed; the said Judge or Magistrate shall be obliged, and is hereby appointed and ordained to accept of the foresaid Bail, and set the Prisoner at Liberty, under the like Penalty of wrongous Imprisonment.

And his Majesty, with Advice and Consent foresaid, further Statutes and Ordains, That upon Application of any Prisoner for Custody in order to Trial, whether for capital orailable Crimes, to any of the Lords of Justiciary, or other Judge or Judicatory competent, for judging the Crime or Offence for which he is imprisoned, and the said Prisoner his producing the said Double of the Warrant of his Imprisonment under the Keeper's Hand, the said Judge or Judicatory competent, under the Pain of wrongous Imprisonment, are hereby ordained

before the Justiciary Court. 63

ordained, within 24 Hours after the said Application and Petition is presented to him or them, to give out Letters or Precepts direct to Messengers, for intimating to his Majesty's Advocate or Procurator Fiscal, and Party appearing by the Warrant to be concerned, if any be within the Kingdom, to fix a Diet for the Trial, within Sixty Days after the Intimation;

Certifying his Majesty's Advocate or Procurator Fiscal, and the said Party concerned; That if they failzie, the Prisoner shall be discharged and set at Liberty without Delay, for doing whereof the said Judge or Judicatory competent, are hereby expressly warranted and strictly required and ordained to do the same, under the Penalty foresaid, unless the Delay be upon the Prisoner's Petition or Desire;

And the Diet of the Trial being prefixed, the Magistrates of the Place, or Keeper of the Prison, shall then be obliged to deliver the Prisoner to a sufficient Guard, to be provided by the Judge, His Majesty's Advocate, or Procurator Fiscal, that the Prisoner may be sifted before the Judge competent, and his Majesty's Advocate, or Procurator Fiscal, shall insist in the Libel, and the Judge put the same to a Trial, and the same shall be determined by a final sentence within 40 Days, if before the Lords of Justiciary, and 30 Days if before any other Judge.

And

And if his Majesty's Advocate, or Procurator Fiscal, do not insist in the Trial at the Day appointed, and prosecute the same to the Conclusion aforesaid, His Majesty, with Advice aforesaid, Statutes and ordains, That the Diet shall then be *simpliciter* deserted, and the Prisoner immediately liberate from his Imprisonment for that Crime or Offence;

And if no Process be raised and execute within the Time allowed, or in Case of not insisting at the Diet, and bringing the Process to a Conclusion within the aforesaid Space, it shall be lawful to the Prisoner to apply to the Justice General, Justice Clerk, or any of the Lords of Justiciary, or Judge competent *respective*; and upon his Application and instructing, that the limited Time by Law for insisting or concluding the Process is elapsed, and Instruments taken thereupon, the said Justice General, Justice Clerk, Lords of Justiciary, and Judge competent, shall be obliged within 24 Hours, to issue out Letters or Precepts direct to Messengers, for charging the Magistrates, or Keepers of the Prison where the Prisoner is detained, for setting him at Liberty, under the Penalty of wrongous Imprisonment, in Case of Delay or Refusal to grant the said Letters or Precepts, or to set him at Liberty after the Charge, without Prejudice to the Keeper of the Prison, as to his Dues.

in

before the Justiciary Court. 65

in all Cases of Liberation, as formerly before the making of this Act;

And the Prisoner being liberate in Manner foresaid, it shall not be lawful to put or detain him in Prison for the same Crime, under the Penalty of wrongous Imprisonment, in case his former Liberation be made known to the Committer before the Warrant be granted; or in Case he be detained after his former Imprisonment is sufficiently instructed to the Keeper of the Prison, who upon Production of the former Warrant of his Liberation from his Imprisonment for the same Crime, shall be obliged to set the Prisoner forthwith at Liberty, unless there be new Criminal Letters raised before the Commissioners of Justiciary, and duly execute against the said Prisoner; In which case, 'tis hereby declared lawful to imprison him of new, though the said Letters be raised for the same Crime for which he was formerly incarcerate, and it shall be lawful to apprehend and secure him at the Time of executing the saids Letters, or at any Time thereafter before Trial, and to detain him till his Trial, or that he be set at Liberty in the due Course of Law.

And His Majesty, with Advice and Consent foresaid, Ordains his Majesty's Advocate to insist in the said Libel, and prosecute the same to a final Sentence, within 40 Days after the

E

said

said Prisoner is of new incarcerate thereupon, unless the Delay be upon the Application, or at the Desire of the Prisoner; wherein, if the King's Advocate failzie, the Diet is to be deserted *simpliciter*, and the Prisoner ordained to be set at Liberty from the said Imprisonment. And the Process not being duely prosecuted as aforesaid, and the Diet thereupon deserted, His Majesty, with Advice and Consent foresaid, declares the Party imprisoned a second Time as aforesaid, to be for ever free from all Question or Process for the foresaid Crime or Offence; providing always, That in case of Imprisonment for Treason, the Prisoner shall not have Access to apply for prefixing of a Diet for Process for 40 Days after his Imprisonment, which are hereby allowed for preparing of the Process; after elapsing of which Time, the Lords of his Majesty's Privy Council, or Lords of Justiciary, or any one of them, are hereby required, upon the Application of the Prisoner, to issue forth Precepts as in other Cases. And in Case of not insisting, or prosecuting the Process as aforesaid, the Prisoner shall be liberate upon sufficient Bail, to compear at any Time when called, within 12 Months, for his good and peaceable Behaviour in the mean time, the said Bail not exceeding the Double of the Bail in other Crimes.

Declar-

before the Justiciary Court. 67

Declaring; that the Liberation provided by this present Act, is only to be understood from Imprisonments for the Causes foresaid, and without prejudice of all personal Diligence or Imprisonments for Payment of Debts; or upon Sentence; or for any other Causes than these above expressd, in the same Way and Manner, as was competent before the making hereof.

And sicklike, it is hereby provided and declared, that this present Act is no ways to be extended to Coalliers or Salters, and the same is without Prejudice or Derogation from former Laws, requiring Bail to be given by Chiftians; Land-lords or others in the *Highlands*; reserving likewise Commitments, Imprisonments; and the Prosecution of Thefts, Robberies, and Depredations in the Borders and *Highlands*, according to the former Laws and Customs, any Thing in this Act notwithstanding; without prejudice also to inferior Magistrates, Judges, or Justices of the Peace and Constables, to take Security of Persons for their good Behaviour, and keeping of the Peace, as they have been in use formerly to do, or to imprison in order to a Trial, for Indignities done to the said inferior Magistrates, Judges, or Justices of the Peace, or to imprison Parties Disobedient and Contumacious to Church Censures, Vagabonds and Masterful Beggars; or to imprison for Riots, Bloods, and Batteries, or Persons found acting

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in Tumults; or for Drunkenness, Sabbath-breaking and Swearing, Uncleaness, Pickeries and Thieving. For which Causes, or any of them it shall be lawful to proceed as formerly, the Person imprisoned having always his Relief by offering Bail, and demanding a Trial as above.

As also providing, that, in the Case of imminent or actual Invasion, Rebellion, or Insurrection, Commitments may proceed by Order of the Privy Council, or any five of the Number, upon Suspicion of Accession thereto without being liable to any Penalty for the said Commitment, the Person imprisoned having always his Relief for Trial of Liberation as aforesaid.

And his Majesty, without Consent foresaid Statutes and Ordains, That the Pain of wrongous Imprisonment shall be *L. 6000* for a Nobleman, and *L. 4000* for a landed Gentleman, and *L. 2000* for every other Gentleman and Burghes, and *L. 400* for other Persons.

And if any Prisoner be detained after elapsing of the respective Days in Manner above prescribed, for obtaining his Liberty, the Judges, Magistrates or others wrongously detaining shall be liable in the Pains following, *viz. L. 100* for each Day for a Nobleman, *L. 13 lb. 4 d.* for a landed Gentleman, *L. 6 lb. 8 d.* for other Gentlemen and Burghes

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L. 6 13 sh. 4 d. for other Persons. A

further, shall lose their Offices, and be incapable of publick Trust, by and attour the Pains above specified, and the Penalty to belong to the Party imprisoned, and Proceſs to be competent for the ſame before the Lords of his Maſteſty's Privy Council, or before the Lords of Council and Session, to be diſcuſſed by them ſummarily, without abiding the Courſe of the Roll.

And it is hereby declared, That the above Penalties ſhall not be modified by any Power or Authority whatſomever.

And his Maſteſty, with Advice and Conſent foreſaid, extends this Act for preventing of wrongous Imprisonment, to the Caſe of all Confinments, not either conſented to by the Party, or inflicted after Trial by Sentence:

And further, Diſcharges all cloſs Imprisonments, beyond the Space of eight Days from the Commitment, under the Pains of wrongous Imprisonment above ſet down.

As alſo, That no Perſon be transported furth of this Kingdom, except with his own Conſent given before a Judge, or by legal Sentence, certifying Judges and Magiſtrates, and all others who ſhall give Order otherwiſe for the ſaid Transportation, as likewiſe, all ſuch who ſhall transport any Perſon without a law-
L. ful Warrant from a Judge or Magiſtrate, that

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he shall be liable to the foresaid Pains of wrongous Imprisonment, as also, of being deprived, and declared incapable of all publick Trust.

And his Majesty, with Advice and Consent foresaid, enacts and declares, That Action and Process for wrongous Imprisonment shall prescribe, if not pursued within three Years after the last Day of the wrongous Imprisonment; and Process being once raised, the same shall prescribe, if not insisted in yearly thereafter.

And it is hereby statute and ordained, by Advice and Consent foresaid, That no Member of Parliament, attending, shall be imprisoned or confined, upon any Account whatsoever, during a Session of Parliament, without a Warrant of Parliament, reserving to the High Constable and Marishal their Privileges and Jurisdictions in the Time of Parliament as formerly.

And also providing, That if any Member shall happen to commit a Capital Crime, or if there be a manifest Hazard of the Peace, any Magistrate may attach for securing of the Person or the Peace, and deliver the Person to the Custody of the High Constable, in order to the Parliament's Cognition the next Session.

before the Justiciary Court. 71

The Form of the Petition, which the Prisoner gives into the whole Lords, if in Time of Session, or to any one of them, if in Time of Vacance, for Letters or Precepts of Intimation.

Unto the Right Honourable the Lords Justice General, Justice Clerk and Commissioners of Justiciary,

The PETITION of C. D. Prisoner in the Tolbooth of Edinburgh,

Humbly sheweth,

THat where I being incarcerated within the said Tolbooth, by Warrant of the Lord Justice Clerk, for the Crime of Murder alledged committed by me, conform to an Information subscribed against me by *A. B.* In which Tolbooth I have continued for some considerable time, without any Appearance of being brought to a Trial; whereby I may vindicate my Innocence of the said alledged Crime: Therefore I humbly address my self to your Lordships for the Benefit of the Act of Parliament, *K. William Par. 1. Sess. 8. and 9. Cap. 6. 1701, Act for preventing wrongous Imprisonment, and against undue Delays in*

E 4

Trials,

Trials, having in the Terms of the said Act produced the Double of the Warrant of my Imprisonment, under the Hand of the Keeper of the Prison.

May it therefore please your Lordships, to grant Warrant for Letters of Intimation, for charging his Majesty's Advocate, and Party appearing by the Warrant to be concerned, to fix a Diet for my Trial, within Sixty Days, in the Terms and under the Certifications contained in the said Act.

C. D.

The Prisoner signs this Petition, or an Advocate for him. Within Twenty four Hours after presenting of the Petition, and signing of the Deliverance thereon, Letters of Intimation must be given out by the Clerk of Court, under the Pains of wrongous Imprisonment. The Deliverance on this or the like Petition runs thus.

The Lords Justice General, Justice Clerk and Commissioners of Justiciary, having heard the within Petition, with the Double of the Warrant of Imprisonment, attested by the Keeper of the Prison, herewith produced, grant Warrant for Letters of Intimation to the Petitioner, to the Effect and in the Terms of

before the Justiciary Court. 73

of the Act of Parliament within mentioned.

A. C. I. P. D.

*Follows the Letters of Intimation on the fore-
said Petition.*

GEORGE, by the Grace of God, King of Great Britain, France and Ireland, Defender of the Faith, &c. For as much as by Petition given in and presented to our Lords Justice General, Justice Clerk and Commissioners of Justiciary, by *C. D.* Prisoner in the Tolbooth of *Edinburgh*, humbly shewing, That where, he being incarcerated within the Tolbooth of *Edinburgh*, by Warrant of the Lord Justice Clerk, for the Crime of Murther committed by him, conform to an Information subscribed against him by *A. B.* in which Tolbooth he has continued for some considerable Time, without any Appearance of being brought to a Trial, whereby he might vindicate his Innocence of the said alledged Crime: Therefore he humbly addressed himself to our said Lords Justice General, Justice Clerk and Commissioners of Justiciary, for the Benefit of the Act of Parliament, King *Wm.* Parl. 1 Sess. 8 and 9. Cap. 6. 1701. *Act for preventing wrongous Imprisonment, and against undue Delays in Trials*, having, in the Terms of the said Act, produced the Double of the Warrant of

of his Imprisonment, under the Hand of the Keeper of the Prison. And therefore craving it might please their Lordships, to grant Warrant for Letters of Intimation, for charging our Advocate, and Party appearing by the Warrant to be concerned, to fix a Diet for the Petitioner's Trial, within Sixty Days, in the Terms and under the Certifications contained in the said Act, as the said Petition bears. Which Petition, with a Double of the Warrant of Commitment, signed by the Keeper of the Prison, therewith produced, being read and considered by their Lordships, they, by their Deliverance thereon, of the Day and Date of thir Presents, ordained thir our Letters to be direct thereon in Manner under written. Our Will is herefore, and we charge you strictly and command, that incontinent thir our Letters seen ye pass, and in our Name and Authority make due and lawful Intimation to our Advocate or his Deputes, and the Party appearing, by the attested Double of the Warrant of Commitment, to be concerned, to fix a Diet for the said C. D. his Trial, within Sixty Days next after the Intimation, in the Terms and under the Certifications contained in the Act of Parliament above mentioned. According to Justice, as ye will answer to us thereupon; the which to do, we commit to you conjunctly and severally

before the Justiciary Court. 75

verally our full Power, by thir our Letters, delivering them by you duly execute and indorsed again to the Bearer. Given under our Signet, at *Edinburgh* the — Day of — and of our Reign the — Year 17 .

Per actum Dominorum Commissionariorum Justiciarum.

J. D. Clerk.

These Letters are signet with their own Seal.

The Letters of Intimation are given to a Macer of Court or Messenger to execute, which being done, he returns an Execution thereof against the Advocate and Party concerned, to fix a Day for the Petitioner's Trial within 60 Days after his Intimation (on every Crime excepting Treason) In which Case the Prisoner cannot apply for Letters of Intimation till he be 40 Days in Prison, and these Days are allowed for preparing of the Process, whereas in other Crimes he may apply the Day after he is imprisoned.

Follows the Copy of the Intimation given by the Macer to the Advocate and the private Party concerned.

I J. G. Macer to the Justiciary Court, by virtue of Letters of Intimation raised at the
12.

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Instance of *C. D.* Prisoner in the Tolbooth of *Edinburgh*, (whereof the above is an just Copy to the Will) in his Majesty's Name and Authority, I make due and lawful Intimation to you *D. F.* his Majesty's Advocate for his Highness Interest, to fix a Diet for the Trial of the said *C. D.* within Sixty Days next after my Intimation, in the Terms and under the Certifications contained in the Act of Parliament abovementioned; conform to the principal Letters dated and signet at *Edinburgh*, the — Day of — and — Year in all Points. This Intimation I make to you this — Day of — and Year foresaid, before these Witnesses * . * . * . and * . * .

*Per actum Dominorum Commissionariorum
Justiciarum. J. G. Macer.*

*Follows the Execution of the Copy given to the
Advocate and the private Party concerned.*

Upon the — Day of — 17 Years I *J. G. Macer* to the Justiciary Court, past at Command of Letters of Intimation at the Instance of *C. D.* Prisoner in the Tolbooth of *Edinburgh*, and by vertue thereof, in his Majesty's Name and Authority, made due and lawful Intimation to *D. F.* his Majesty's Advocate for his Highness Interest, and *G. D.* private Party concerned, to fix a Diet for the said *C. D.* his Trial, within the Space, under the Pains and
made

before the Jusficiary Court 77

made Certification as is within exprest. This I did after the Form and Tenor of the said Letters in all Points, by delivering a full Double of the said Letters to the Will, with a short Copy on the End thereof, subscribed by me, to the said *D. F.* his Majesty's Advocate, and *C. D.* private Party concerned, both personally apprehended. Which Copies did contain the Day and Date hereof, Witnesses Names and Designations therein insert, present thereat, and hereto subscribing, *viz. J. Y. E. F.* and *T. T.* And for the more Verification hereof, I and the said Witnesses have subscribed the same.

J. G. Macer

So soon as Intimation is given, the Advocate or private Party, if they have a mind to insist in the Prosecution, prepares an Indictment with a List of Witnesses thereon, signed by him against the Prisoner, and gives it into the Clerk of Court, to issue out Letters of Dilligence for summoning the Prisoner, Witnesses and Affizers against the Day of Compearance in order for his Trial, and this Trial must come on within the 60 Days, and be finished within the 40 or 30 Days as the Law directs.

When the 60 Days are run, and no Indictment execute, then the Prisoner instruments the Advocate and private Party, and upon his
Ap.

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Application and instructing, that the limited Time by Law for insisting is elapsed, gives in a Petition to any of the Lords for Letters of Liberation, whereof the Tenor follows.

Unto the Right Honourable, The Lords Justice General, Justice Clerk and Commissioners of Justiciary,

The PETITION of C. D. Prisoner in the Tolbooth of Edinburgh,

Humby Sheweth,

THAT where upon a signed Information given in against me by *A. B.* for the alledged Crime of Murder committed by me, he obtained Warrant from the Lord Justice Clerk, and imprisoned me in the said Tolbooth, where I still remain. Being conscious of my Innocency, I applied to your Lordships, for Letters or Precepts of Intimation, directed against *D. F.* his Majesty's Advocate, and *A. B.* private Party concerned, for fixing a Diet for my Trial, in the Terms of the Act of Parliament 1701. And your Lordships having granted the Desire thereof, I caused charge his Majesty's Advocate and the private Party concerned for that Effect, as the Precepts or Letters and Execution thereof herewith produced will testify.

And

before the Justiciary Court. 79

And seeing my sixty Days, from the Date of the said Charge are more than elapsed, I do therefore address your Lordships for my Liberation in the Terms of the said Act of Parliament.

May it therefore please your Lordships, in Consideration of the Premises, to grant Warrant for my Liberation, as the said Law directs.

According to Justice,

C. D.

The Prisoner signs this Petition to Advocate for him.

Follows the Interlocutor on the foresaid Petition.

The Lords Justice General, Justice Clerk and Commissioners of Justiciary, having considered the within Petition, with the Letters of Intimation and Execution therewith produced, grant Letters or Precepts direct to Maccers or Messengers for charging the Magistrates of *Edindurgh* and Keepers of their Tolbooth, within which the Prisoner is detained, to set him at Liberty furth thereof, under the Pains contained in the Act of Parliament.

ILAY I. P. D.

Follows

Follows the Letters of Liberation on the foresaid Petition.

GEORGE by the Grace of **GOD**, King of Great Britain, France and Ireland, Defender of the Faith, To our Lovits

Macers, Messengers at Arms our Sheriffs in that Part conjunctly and severally, specially constitute, Greeting : **FORASMUCH** AS by Petition given in and presented to our Lords Justice General, Justice Clerk, and Commissioners of Justiciary, by *C. D.* Prisoner in the Tolbooth of *Edinburgh*, humbly shewing, That where upon an signed Information given in against the said *C. D.* by *A. B.* for the alledged Crime of Murder, he thereupon obtained Warrant from our Lord Justice Clerk, for imprisoning the said *C. D.* within the said Tolbooth, where he still remains. And being conscious of his Innocency, he applied to our Lords Justice General, Justice Clerk, and Commissioners of Justiciary, for Precepts direct against our Advocate and private Party concerned, for fixing a Diet for the Petitioner's Trial in the Terms of the Act of Parliament 1701. And our said Lords having granted the Desire thereof, the Petitioner caused charge our Advocate and Party concerned for that Effect, as the Letters of Intimation and Execution thereof therewith produced

before the Justiciary Court. 81

ed doth testify. And seeing the 60 Days from the Date of the said Charge are more than elapsed, the Petitioner did therefore address our said Lords for Letters of Liberation, in Terms of the said Act of Parliament. And therefore craving it might please their Lordships, in Consideration of the Premises, to grant Warrant for his Liberation, in Terms of the said Act, as the said Petition bears. Which Petition, with the Letters of Intimation and Executions thereof therewith produced, being read and considered by their Lordships, they, by their Deliverance thereon, of the Day and Date of thir Presents, ordained thir our Letters to be direct thereon in Manner underwritten. **OUR WILL IS HEREOFRE**, and we charge you strictly and command, that in continent thir our Letters seen, ye pass, and in our Name and Authority command and charge, the Magistrates of *Edinburgh* and Keepers of their Tolbooth, within which the said *C. D.* is detained, to set the Person of the said *C. D.* at Liberty furth thereof, under the Pains contained in and conform to the Act of Parliament 1701. According to Justice, as ye will answer to us thereupon, the which to do we commit to you conjunctly and severally our full Power, by thir our Letters, delivering them by you duly execute and indorsed again to the Bearer. Given,

F

under

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under our Signet, at *Edinburgh*, the — Day
of — and of our Reign the — Year 17.

*Per actum dominorum commissiona-
riorum justiciarum.*

J. D. Clerk.

The Letters are signet with their own Seal.

These Letters must be issued out within 24
Hours after presenting of the Petition under the
Pains of wrongous Imprisonment.

The foresaid Letters are execute by a Mace
or Messenger, for charging the Magistrates of
Edinburgh and Keeper of their Tolbooth, and
all other Magistrates within *Scotland* and Keep-
ers of their Prisons whatsomever, and all other
Persons in whose Custody the said *C. D.* is
presently detained, furthwith to set him at
Liberty, out of their Tolbooths and other
their Warding-places, under the Pain of wrong-
ous Imprisonment.

But if the 60 Days be elapsed, and no Indict-
ment given the Prisoner within that Time, and
he perhaps shall be detained in Prison for his
Dues or otherways, after he has obtained his Li-
beration ; in that Case, if the Advocate or pri-
vate Party has a mind to prosecute the Prisoner,
he must be charged with Criminal Letters
and Warrant obtained for imprisoning him af-
new, or detaining him there for the same Crime,
and the Process must be concluded within 40
Days

before the Justiciary Court. 83

Days thereafter. It is to be observed, that Criminal Letters are never execute, except against those who are out of Prison, or in Case where the Prisoner is detained for his Fies; and even then as to the Prosecuter or Crime, the Criminal is reckoned out of Prison, because of the Letters of Liberation, and he is only detained for his Fies.

If the Advocate or his Depute incline to prosecute the Criminal, upon the forty Days after his Liberation from the sixty Days, he applies to the Lords by a Bill made out and signed by him or by his Depute, and gives it into the Clerk of Court, and the Clerk writes thereon after this manner.

Apud Edinburgum — die mensis — Anno Domini — fiat ut petitur to the — Day of — next to come, and one of the Judges signs thereto, with which Bill there is a List of forty five Assizers made out, and signed by a Quorum of the Lords.

Follows the Form of the Letters taken out against a Criminal, whither in Prison or out of Prison, when the 40 Days take Place.

GEORGE, by the Grace of God King of Great Britain, France and Ireland, Defender of the Faith, To our Lovits

Macers, Messengers at Arms, our Sheriffs in that Part, conjunctly

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and ſeverally, ſpecially conſtitute, Greeting
FORASMUCHAS, it is humbly meaned and
 complained to us by our Lovit *D. F.* our Ad-
 vocate for our Intereſt, upon *C. D.* That where
 by the Law of God, and of this and every
 well governed Realm, the Crimes of Murder
 are ſeverely puniſhable, with all the Aggra-
 vations thereof and Tendencies thereto, parti-
 cularly by Act of Parliament — Yet true it
 is and of Verity, that the ſaid *C. D.* is Guilty,
 Actor, Art and Part of the foreſaid Crime, **IN**
SO FAR AS he, of himſelf, or with and by
 Accomplices, did maſterfully, out of a mur-
 dering Deſign, and from a propenſe and pre-
 meditate Malice, ly in wait, upon the —
 Day of — and — Year, betwixt — and
 — in the Pariſh of — and County of —
 at the Place called — or near by that Place;
 and then and there, betwixt the Hours of —
 and — in the Night-time of the ſaid Day,
 or upon one or other of the Days of the ſaid
 Month and Year, or upon one or other of the
 Hours of the ſaid Night, or Nights of the
 ſaid Day or Days, feloniously attack the Perſon
 of *E. F.* without any Manner of Provocation,
 and that, as he was coming Home to his own
 Houſe, Family or Place of Reſidence; and
 then and there, or near by the ſaid Place, he of
 himſelf, or ſaids Accomplices, did murder
 the ſaid *E. F.* with a Durk, Poinard, or ſome
 other

before the Justiciary Court. 85

other mortal Weapon, by thrusting the same below his left Pap, opposite to his Heart, whereof he immediately died. And thereafter most inhumanly and barbarously did drag him to a Pond near by, where he of himself, or said Accomplices, threw the said E. F. in, on purpose to conceal his cruel and wicked Murder, and when missed and Search made, he was there found dead. WHICH, or any Part thereof, or he being Guilty, Actor, Art and Part of the said Crime, being found proven by the Verdict of an Assize, before our Lords Justice General, Justice Clerk, and Commissioners of Justiciary, he ought to be punished with the Pains of Law, to the Example and Terror of others from committing the like in Time coming. OUR WILL IS HEREOF, and we charge you strictly and command, That incontinent thir our Letters seen ye pass, and in our Name and Authority command and charge the said C. D. above complained upon, to compear, and to come and find sufficient Caution, and Soverty acted in the Books of *Adjournal*, That he shall compear before our Lords Justice General, Justice Clerk and Commissioners of Justiciary, within the Tolbooth or Criminal Court House of *Edinburgh*, the — Day of — next to come, in the Hour of Cause, there to underly the Law for the Crime abovementioned. And that

that under the Pains contained in the Acts of Parliament; And that ye charge him personally, if he can be apprehended, and failzieing thereof at his Dwelling house, and by open Proclamation at the Market Cross of the Head Burgh of the Shire, Stewarty, Regality, or other Jurisdiction where he dwells, to come and find the said Caution and Soverty, acted in manner foresaid, within — Days next after he bees charged by you thereto, under the Pain of Rebellion and putting of him to our Horn. Whilk — Days being bygone, and the said Soverty not found, nor no Intimation made by him to you of the finding thereof, That in continent thereafter ye denounce him our Rebel, and put him to our Horn, escheat, and in bring all his Moveables Goods and Gear, to our Use, for his Contempt and Disobedience, and that you within Fifteen Days thereafter cause registrate thir our Letters with the Executions thereof in our Books of *Adjournal*, conform to the Act of Parliament made thereanent; and if he come and find the said Caution (Intimation always being made by him to you of the finding thereof) that ye summon an Assize hereto, not exceeding the Number of forty five Persons, together with such Witnesses who best knew the Verity of the Premises, whose Names shall be given you in List subscribed by the said Complainers, or either of them,

before the Justiciary Court. 87

them, to compear before our Lords, Day and Place foresaid, the said Persons of Inqueist to pass upon his Assize, and the said Witnesses to bear leil and soothfast Witnessing, in so far as they know or shall be spiered at them, Ilk Person under the Pain of 100 Merks. According to Justice, as ye will answer to us thereupon. The which to do we commit to you, conjunctly and severally our full Power, by thir our Letters, delivering them by you duly execute and indorsed again to the Bearer. Given under our Signet at *Edinburgh* the — Day of — and of our Reign the — Year, 17—

Ex deliberatione Dominorum Commissio-
nariorum Justiciarum. J. D. Clerk.

The Letters are signet with their own Seal.

The Letters being made out, and signed by the Clerk, and given to the Advocate or his Depute, they are ordered to be execute against the Criminal ; and if he be out of Prison, Application is made by the Advocate or his Depute, to any one of the Lords, for a Warrant for apprehending, and putting the Criminal in Prison (or if he be in Prison, the Letters are to be first execute against him, and thereafter to intimate the Warrant to the Keeper of the Prison) and so soon as the Letters are execute against the Criminal, if personally and out of Prison, the Executer is

to apprehend and imprison him in the next sure Tolbooth, therein to remain until he be thence liberate in due Course of Law.

If the criminal Letters be at the Instance of the private Party, with Concourse of the Advocate, the Party must find Caution for reporting the Letters; but if the Letters be at the Advocate's Instance only, he finds no Caution, because he pursues *ex officio*.

Follows the Copy of the Criminal Letters given by the Macer or Messenger to the Criminal.

I J. G. Macer to the Justiciary Court, by Vertue of Criminal Letters raised at the Instance of D. F. his Majesty's Advocate, for his Highness's Interest, against C. D. in his Majesty's Name and Authority command and charge you the said C. D. to compear, and to come and find sufficient Caution and Soverty, acted in the Books of Adjournal, that you shall compear, before the Lords Justice General, Justice Clerk and Commissioners of Justiciary, within the Tolbooth or criminal Court-house of *Edinburgh*, the _____ Day of _____ next to come, in the Hour of Cause, there to underly the Law, for the Crime mentioned in the said criminal Letters; and that under the Pains contained in the Acts of Parliament. And that you come and find the said Caution
and

before the Justiciary Court: 89

and Sovery, acted in Manner foresaid, within — Days next after this my Charge, under the Pain of Rebellion and putting of you to the Horn, with Certification, conform to the principal Letters, dated and signet at *Edinburgh*, the — Day of — of the which principal criminal Letters, with a List of the Affizers Names and Designations that are to pass upon your Affize, and List of the Witnesses Names and Designations, that are to be adduced against you, I herewith give you a just and exact Copy, upon this — Day of — and — Year. Before these Witnesses — — and —

Ex deliberatione Dominorum Commissionariorum Justiciarum.

J. G. Macer.

Follows the Execution against the Criminal, if personally apprehended.

Upon the — Day of — and — Year, I *J. G. Macer* to the Justiciary Court, past at Command of criminal Letters, raised at the Instance of *D. F.* his Majesty's Advocate, for his Highness Interest, and by Vertue thereof, in his Majesty's Name and Authority, commanded and charged *C. D.* to compear, and to come and find sufficient Caution and

and Soverty, acted in the Books of Adjournal, that he shall compear before the Lords Justice General, Justice Clerk and Commissioners of Justiciary, within the Tolbooth or criminal Court-house of *Edinburgh*, the — Day of — next to come, in the Hour of Cause, there to underly the Law, for the Crime within mentioned; and that he come and find the said Caution and Soverty, acted in Manner foresaid, within the Space, under the Pains, and made Certification, as is within exprest. This I did after the Form and Tenor of the said criminal Letters in all Points, which are dated and signet at *Edinburgh*, the — Day of — by delivering to the said *C. D.* a full Double of the said Letters, with a List of the Affizers Names and Designations, that are to pass upon his Affize, and a List of the Witnesses Names and Designations, that are to be adduced against him, with a short Copy, by Way of Charge, subjoined thereto, subscribed by me, personally apprehended. Which Copy did contain the Day and Date hereof, Witnesses Names and Designations therein insert, present thereat and hereto subscribing, viz. *A. B.* and *F. G.* And for the more Verifi-

cation

before the Justiciary Court. 91

ation hereof, I and the said Witnesses have subscribed the samen.

A. B. Witness.

J. G. Macer.

F. G. Witness.

Follows the Execution against the Pannel, if not personally apprehended.

Upon the — Day of — and — Year, I J. G. Macer to the Justiciary Court, past at Command of criminal Letters, raised at the Instance of D. F. his Majesty's Advocate, for his Highness Interest, and by Ver-tue thereof, in his Majesty's Name and Authority, commanded and charged C. D. to compear, and to come and find sufficient Caution and Soverty, acted in the Books of Adjournal, that he shall compear before the Lords Justice General, Justice Clerk and Commissioners Justiciary, within the Tolbooth or criminal Court-house of *Edinburgh*, the — Day of — next to come, in the Hour of Cause, there to under-ly the Law, for the Crime within mentioned. And that he come and find the said Cau-tion and Soverty, acted in Manner fore-said, within the Space, under the Pains, and
made

made Certification, as is within exprest. This I did, by leaving a full Double of the said Letters, with a List of the Assizers Names and Designations, that are to pass upon his Assize, and a List of the Witnesses Names and Designations, that are to be adduced against him, with a short Copy, by Way of Charge, subjoined thereto, subscribed by me, to the said C. D. (with his Wife, Son, Daughter, or Servant) and that within the Lock Hole of the most patent Door of his dwelling House, after six several Knocks given by me thereat; because I could not get him personally apprehended. And sicklike upon the said — Day of — and Year foresaid, I past to the Market Cross of — Head Burgh of the Sherifsdome thereof, within which Sherifsdome the said C. D. dwells and resides, and his Lands ly; And thereat, after the crying of three Oyesses, open Proclamation, and publick reading of the within written Criminal Letters, I, in Name and Authority foresaid, commanded and charged the said C. D. to compear before the said Lords, Day and Place within contained, and that within the Space, under the Pains, and made Certification as is within exprest. This I did, by affixing and leaving a full Double of the said Letters, with a List of the Assizers Names and Designations that are to pass upon his Assize,

Assize,
and D
gainst
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and
said C.
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charge

23 *before the Justiciary Court.*

Affize, and a List of the Witnesses Name and Designations, that are to be adduced against him, with a short Copy, by Way of Charge, subjoined thereto, subscribed by me, and upon the said Market Cross, for the said C. D. because I could not get him personally apprehended. All which Copies did contain the Day and Date hereof, Witnesses Names and Designations therein insert, present thereat, and hereto subscribing, viz. A. B. and F. G. And for the more Certification hereof, I and the said Witnesses have subscribed the samen.

A. B. Witness.

J. G. Macer.

F. G. Witness.

Follows the Copy to be given by the Macer to each of the Witnesses, contained in the List given to the Criminal.

I J. G. Macer to the Justiciary Court, by Vertue of Criminal Letters raised at the Instance of D. F. his Majesty's Advocate for his Highness's Interest, against C. D. in his Majesty's Name and Authority, summon, warn and charge you, — to compear before the Lords

Justice

Justice General, Justice Clerk and Commissioners of Justiciary, within the Tolbooth or Criminal Court-house of *Edinburgh*, the — Day of — next to come, in the Hour of Cause, to bear leil and sooth fast witnessing, in so far as you know, or shall be spiered at you, anent the said *C. D.* his Guiltiness of the Crime libelled against him, under the Pain of 100 Merks. This I give you upon this — Day of — 17 — Year, before these Witnesses, — and —

Ex deliberatione Dominorum Commissariorum Justiciarum.

J. G. Macer.

Follows the Execution given by the Macer upon summoning the Witnesses.

Upon the — Day of — and — Year, I *J. G. Macer* to the Justiciary Court, past at Command of Criminal Letters raised at the Instance of *D. F.* his Majesty's Advocate, for his Highness Interest against *C. D.* and by Vertue thereof, in his Majesty's Name and Authority, summoned, warned and charged — — — — — and — to compare before the Lords Justice General, Justice Clerk, and Commissioners of Justiciary within the Tolbooth or Criminal Court-house of *Edinburgh*, the — Day of — next to come, in the Hour of Cause

before the Justiciary Court. 95

Cause, to bear leil and soothfast witnessing, in so far as they know or shall be spiered at them anent the said C. D. his Guiltiness of the Crime libelled, ilk one of the said Witnesses, under the Pain of 100 Merks. This I did conform to the said Criminal Letters in all Points, which are dated and signet at *Edinburgh* the — Day of —, by delivering to the said — and — a short Copy subscribed by me (personally apprehended) and by leaving to the said — and — an short Copy subscribed by me, within each of their Dwelling-houses, with their Wives or Servants, because I could not get them personally apprehended. All which Copies did contain the Day and Date hereof, Witnesses Names and Designations therein insert, present thereat, and hereto subscribing, before these Witnesses A. B. and F. G. and for the more Verification hereof, I and the said Witnesses have subscribed the samen.

A. B. Witness.

J. G. Macer.

F. G. Witness.

Follows the Form of the Copy given to each of the Assizers contained in the List given to the Criminal.

I J. G. Macer to the Justiciary Court, summon you — to compear before the Lords Justice

tice General, Justice Clerk and Commissioners of Justiciary, within the Tolbooth or Criminal Court House of *Edinburgh*, the — Day of — next to come, in the Hour of Cause, to pass upon the Affize of C. D. Prisoner within the Tolbooth of *Edinburgh*, under the Pain of 100 Merks. This I give you upon the — Day of — and Year

J. G. Macer.

Follows the Execution given by the Macers.

Upon the — Day of — 17 — Year, we Macers to the Justiciary Court, summon'd, warn'd and charged, the Persons aftermention- ed, to compear before the Lords Justice Gene- ral, Justice Clerk and Commissioners of Justi- ciary, within the Tolbooth or Criminal Court- house of *Edinburgh*, the — Day of — next to come, in the Hour of Cause, to pass upon the Affize of C. D. each under the Pain of 100 Merks, viz.

Person.

before the Justiciary Court. 97

Personally apprehended.

Copies left at their Dwelling-Houses.

G. H. of —
A. B. of —
J. D. of —
J. C. of —
W. B. of —
D. D. of —
J. L. of —
J. C. of —
D. C. of —
W. D. of —
A. B. of —
W. B. of —
A. B. of —
W. C. of —
W. G. of —
W. G. of —
G. W. of —
G. G. of —
F. G. of —
G. B. of —
W. K. of —
P. R. of —
W. G. of —

H. C. Merchant in Edinburgh,
W. M. Copper-smith there,
W. L. Copper-smith there,
N. I. Merchant there,
K. M. Gold-smith there,
J. J. Jeweler there,
J. A. Merchant there,
J. P. Bookseller there,
G. C. Merchant there,
J. W. Wright there,
J. W. Vintner there,
A. H. Merchant there,
R. B. Vintner there,
G. H. Wright there,
D. F. Merchant there,
W. H. Baxter there,
A. D. Merchant there,
H. C. Merchant there,
A. A. Copper-smith there,
W. W. Merchant there.
J. G. Macer.

H. C. }
J. P. } Macers.

G

The

The criminal Letters being execute against the Prisoner, upon the *inducia legales*, as to his Compearance; the *Friday* or *Saturday* before the Day of Compearance, the Advocate or his Depute, delivers in the criminal Letters, with the Executions against the Pannel, Witnesses and Assizers, to the Clerk of Court, in case the Prisoner, or his Doer, should call for them, and have any Objections against the same; which, if the Prisoner, or his Doer, borrow up the Process, the same is returned to the Clerk that same Day, or upon the Day of Compearance before the Cause is called.

The Day of Compearance being come, and Witnesses and Assizers being called, the Lord having met and come to the Bench, the Clerk inserts the *Sederunt* of the Judges present, in the Book, *viz.*

Curia justiciarum S. D. N. Regis, tenta in pretorio burgi de Edinburgh — die mensis — anno domini — per nobilem & potentem comitem — justiciariam generalem, & honorabiles viros — justiciarium clericum dominos — & — commissarios justiciarum dict. S. D. N. regis.

Curia legitime affirmata.

before the Justiciary Court. 99

The Prisoner being sent for, by a Macer of Court attended by a Guard, and enters the Pannel, the Lords desire the Macer to command Silence, the Clerk being ordered to read the Libel against the Pannel, and the Pannel desired to take Notice thereof.

The Libel being read, the Preses asks the Pannel, What he has to say to his Libel or indictment? The Pannel denying the Crime, or as it is libelled, the Clerk writes in the Book.

Intran.

C. D. indicted and accused at the Instance of *D. F.* his Majesty's Advocate, for his Highness's Interest, as guilty of the Crime of Murder, committed by him in Manner mentioned in the criminal Letters, raised against him hereanent.



The Clerk writes the Advocates Names in the Book thus.

<i>Pursuers.</i>	<i>Procurators in Defence.</i>
Mr. D. F. his Majesty's Advocate, Mr. C. E. his Majesty's Solicitor, Mrs. J. B. and J. F. Advocates.	Mr. J. G. } Advocates Mr. R. D. }

After the Pannel has denied the Libel, the Advocates begin and plead in his Defence *va voce*.

The Use and Custom hitherto observed at that Court, of Advocates their dictating and the Clerk's writing of the Defences, Duplies, Quadruplies, and so forth, for the Defender and Pursuer, is now discharged and laid aside; and in Place thereof, his Majesty's Advocate, or other Advocates or Procurators for the Defender or Pannel, debate the Relevancy *viva voce*. And after the said Debate is ended, then Time is allowed, by the Lords, Judges of the said Court, to the Effect after mentioned, *viz.* That the King's Advocate, or Advocates or Procurators for the Pursuer, do, within the Space of Forty eight Hours

before the Justiciary Court. 101

Hours, give into the Clerk of Court his Information, in Writing subscribed with his Hand; and that the Advocate or Advocates for the Pannel may take it up, and give in their Answers in Writing also under their Hands, within other Forty eight Hours; which Information and Answers are by the Clerk recorded in the Books of Adjournal, in Place of the foresaid written Dispute formerly in Use. And then, at the Advising, the said Information and Answers are first read in open Court; and if any Thing be found new, on either Side, and not noticed by the other Party, the Parties or Judges point the same to the other Party concerned, and hear both Parties there-
viva voce; the Clerk minuting in Presence and at the Sight of the said Judges, what is so further debated: And then the Judges proceed to the advising, which is done within Doors. *Vide Wm. and Mary, Parl. 1. c. 5. Cap. 4.*

If the Pannel is poor, he applies the Lords' Lawyers, as is remarked in Page 40. But where the Pannel is prepared to answer to his Libel or Indictment, and his Advocates ready to debate the Relevancy thereof, then the Lawyers begin and plead in his Defence: In which Debate, the Circumstances of the Crime, and Commission thereof, are given special Notice of. But if the Indict-
ment

ment be libelled on a special Statute, there is no disputing of the Relevancy.

Whatever Heads of Defence are proponed by the Pannel's Lawyers, the Lord Advocate or other Lawyer against him, commits the saids Heads to Writing; and in taking of the same, the Pannel's Lawyers take the like Notice.

But if the Pannel have any legal Objection against the Libel or Indictment, his Copy Execution against him, or Execution against the Witnesses and Affizers, and sustained by the Lords, and the Forty Days so far run, the Trial cannot be concluded within the then the Diet is deserted, and the Pannel set at Liberty, never to be tried for the Crime.

And in case of no relevant Objection, the Trial goes on in common Form.

The Objections against the Pannel's Copy and Executions, are first proponed, before he dip into the Objections against the Libel itself.

And if at pleading, the Pannel or his Defence do observe that there is not Fifteen of Forty five Affizers present, they may and do object against it; which if they do, the Lord stop the pleading, and cause call the List of Affizers, and if there be not Fifteen present

before the Justiciary Court. 103

the Diet is continued, and the absent Assizers
unlawed in One hundred Merks.

In all criminal Pursuits, the Defender or
his Advocate is always the last Speaker, ex-
cept in the Cases of Treason and Rebellion
against the Sovereign.

After the Pleading is over, the Preses or-
dains both Parties to give in their Informati-
ons to the Clerk of Court, in order to be re-
corded; which the Clerk pronounces to the
Macer thus.

The Lords Justice General, Justice Clerk,
and Commissioners of Justiciary, ordain both
Parties to give in their Informations to the
Clerk of Court, in order to be recorded; the
Pursuers to give in theirs, against *Wednesday*
next, at Six a Clock at Night; and the Pan-
nel to give in his against *Friday* thereafter, at
Six a Clock at Night, and Copies to be given
to the Lords. And continue the Cause to
that Day Seven-night at Nine a Clock. And
ordain Assizers and Witnesses to attend at that
Time, each under the Pain of One hundred
Merks: And the Pannel to be carried back to
Prison.

If there is any Need of an Exculpation, the
Pannel may apply for it, at or before plead-
ing his Cause (and is generally contained in

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the Information) which the Judges never omit to grant. And in case any of the Evidences, at the Time, be at a Distance, the Lords grant a competent Time for executing the said Exculpation; and until that Day assigned, the Diet is continued. This Delay being at the Desire of the Pannel, is not to be reckoned up in the Forty Days.

The Tenor of the Exculpation is, for citing Witnesses for proving the Pannel's Allegations against the Libel or Indictment, and what Exceptions or Objections he has to propose against the Witnesses and Assizers given him in List.

A Double of the List of Witnesses, cited for the Pannel, must be given to the Advocate, or private Party, or both, (*Vide Cl. II. Parl. 2. Sess. 3. Cap. 16.*) in case they have any Thing to object against them. And an Execution of Delivery is given by the Executor, for the Pannel's Safety. If this be forgot, it will invalidate his Exculpation, and hinder him the Benefit thereof.

before the Justiciary Court. 105

Follows the Form of the Exculpation.

GEORGE by the Grace of God King of Great Britain, France and Ireland, Defender of the Faith, to our Lovites

Macers, Messengers at Arms, our Sheriffs in that Part, conjunctly and severally, specially constitute, greeting. **FOR AS MUCH AS**, it is humbly meant and shown to us, by our Lovit **C. D.** Prisoner in the Tolbooth of *Edinburgh*, That where the Diet of the criminal Libel, raised at the Instance of **A. B.** with Concourse of **D. F.** our Advocate, for our Interest, against the said **C. D.** for the Crime of Murder, alledged committed by him, in Manner mentioned in the Indictment or Libel raised against him thereanent, was, by our Lords Justice General, Justice Clerk and Commissioners of Justiciary, continued to the — Day of — next to come; and the said **C. D.** having proponed several relevant Defences, for eliding of the said Libel, and also having several relevant Exceptions and Objections, competent for him to propone, against the Witnesses and Assizers given him in List, whereof he will be heavily prejudged, in respect of the Peremptoriness of criminal Diets, unless he obtain our Warrant and Diligence, for citing Witnesses

Witnesses to prove the same in Manner underwritten. **OUR WILL IS HEREFORÉ**, and we charge you strictly and command, that incontinent, thir our Letters seen, ye pass, and in our Name and Authority, summon, warn and charge such Witnesses, who best know the Verity of the said Defences, Exceptions and Objections proponed, or to be proponed by the Complainer, whose Names shall be given you in List subscribed by him, to compear before our said Lords Justice General, Justice Clerk and Commissioners of Justiciary, within the Tolbooth or criminal Court-house of *Edinburgh*, the — Day of — next to come, in the Hour of Cause, to bear leal and soothfast Witnessing, in so far as they know, or shall be speired at them, anent the said Complainer's Innocence, and Exculpation of the Crime libelled against him; ilk Witness under the Pain of One hundred Merks. According to Justice, as ye will answer to us thereupon, &c. Given under our Signet, at *Edinburgh*, the — Day of — and of our Reign the — Year 17

*Ex deliberatione Dominorum Commissi-
onariorum Justiciarum.*

J. D. Clerk.

These

before the Justiciary Court. 107

These Letters pass on a Bill signed by any of the Lords, and are signet with their own Seal.

Follows the Execution upon Delivery of the List of the Pannel's Witnesses to the Advocate, or private Party, or both.

Upon the — Day of — 17 Years I J. G. Macer to the Justiciary Court, by Vertue of Letters of Exculpation, raised at the Instance of C. D. Prisoner in the Tolbooth of *Edinburgh*, against Witnesses, for the Alleviation of the Crime alledged against him, and proving his Innocence thereanent, in the Terms of the Act of Parliament, gave in a List of Witnesses Names and Designations, subscribed by the said C. D. and to be adduced by him in the said Cause, to D. F. his Majesty's Advocate, and A. B. private Party concerned, to object against them, as they should see Cause. This I did after the Form and Tenor of the said Letters in all Points, by delivering to the said D. F. his Majesty's Advocate, and A. B. private Party concerned, a List of the Names and Designations of the said Witnesses to be adduced for the said C. D. (personally apprehended) This I did before these Witnesses A. C. and C. B. And for the more Verification

fication hereof, I and the said Witnesses have subscribed the samen.

J. G. Macer

Follows the Informations.

INFORMATION for his Majesty's Advocate for his Highness Interest,

AGAINST

C. D. of — Prisoner in the Tolbooth of Edinburgh, Pannel.

THE said C. D. is accused as Guilty, Art and Part, of wilful and premeditate Murther, at least of Murther and Homicide: In so far as, upon the — Day of — in the Parish of — and County of — with a Durk, Poinard or some other mortal Weapon, he wounded the decaist G. B. below his left Pape opposite to his Heart, whereof he immediately died, and thereafter did drag him to a Pond near by, where he threw him in, and when missed was there found dead.

The Libel, in the *first* Place, charges the Fact, as proceeding from a causeless Ill-will and Resentment the Pannel had conceived against the Defunct, who at the Time the Wound was given, had done nothing that could be
pre.

before the Justiciary Court. 109

pretended as a Colour or Cause of Provocation.
2do, The Circumstance of premeditate Malice
and forethought Felony is likewise charged.
3tio, Art and Part is also charged against
the Pannel.

At calling before the Lords of Justiciary,
against the first Branch of the Libel, it was ex-
cepted, that the Libel was too general, particular
Circumstances not being exprest, from which
the causeless Ill-will or Rêsentment mentioned,
and Forethought and premeditate Malice could
be inferred, whereby the Pannel was deprived of
the Benefit due to all Pannels when tried for
their Life, to exculpate himself, by shewing,
that if at any Time, prior to the Time men-
tioned in the Indictment, there was any Ap-
pearance of Grudge or Quarrel between the
Defunct and him, there was an After-recon-
ciliation and intire Friendship. And it was
said, that general Libels ought not to be sus-
tained.

To this it was answered, That a previous
Grudge is charged, and that the Deceast
was invaded without any Manner of Provoca-
tion, which is the strongest Evidence of Fore-
thought. Nor will it be found, That in Libels
of Forethought Felony, it is usual or neces-
sary to libel all the Circumstances from which
the Forethought may be presumed, especially
when the *species facti* is charged in that Man-
ner,

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ner, as affords the Presumption of Forethought, setting forth, that the Wound was given without any Manner of Provocation on the Part of the Defunct at that Time: Neither can it be thought unfair with regard to the Pannel, who if he had any relevant Ground of Exculpation, would have Access to prove Friendship with the Defunct, to take off any Charge of precedent Quarrels, whereof he could not be ignorant; and still there must be less Ground of Complaint, where no good Reason of Exculpation is offered, whereby the Pannel can be allowed to adduce a Proof, which 'tis believed is without Contradiction, the Case upon the first Branch of the Libel.

As to the two last Branches of the Libel, it was alledged, that several Circumstances attending the Fact complained of were concealed, which when opened, afforded the Pannel plain and obvious Defences. And therefore it was informed, that the Pannel, a Person disposed to Peace and intire Friendship with the Defunct, chanced to be in Company with him about the Time charged in the Indictment, with one J. K. and others, that J. K. gave him the highest Provocation, not only by Words, but by proceeding so far, as to throw him into a Ditch, where the Pannel was in hazard of perishing, being extreamly Drunk; that getting up, heated with Liquor, and

before the Justiciary Court. III

and so extreemly provoked, he drew his Durk and pursued J. K. and that the Defunct thrusting himself between them casually, received the Thrust aimed at another.

From these Circumstances, it was pled for the Pannel, that if he did kill the Defunct, it was a mere Mis-adventure, rather a Misfortune as a Fault, and in no Event could subject him to the *pœna ordinaria*. For that *imo*, In these Circumstances, had he killed the said J. K. the Pain of Death could not have been inflicted, either by the Law of GOD, the common Law, nor by the Municipal Law of the Kingdom, neither by the Laws of other well governed Realms ; particularly by the Laws of our neighbouring Nation, in regard the Fact was done by Suddenty, by a Person in Drink and highly provoked.

And *imo*, As to the Law of GOD, *Exod. xxi. Chap. and 13. Verse* was appealed to, where it is said, *That if a Man ly not in wait, there was to be a Place appointed whither he should fly*, which seemed to require Forethought, and the *xxxv. Chap. of Numb. Verse 22.* where it was said, *That if any one thrust another suddenly without Enmity, the Congregation was to judge between the Slayer and the Revenger of Blood*: From which it would seem, that Slaughter of Suddenty was not punishable by Death.

To

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To this it was answered, that in the Law of GOD, the general Rule was, *Whoso sheddeth Mans Blood, by Man shall his Blood be shed, and at the Hand of Man, and at the Hand of every Mans Brother, and at the Hand of every Beast was the Life of Man to be required, Gen. Chap. ix.* That by the Law of Moses, Death of a Suddenty was plainly Capital, nor had the Man-slayer the Benefit of the City of Refuge; but where the Slaughter was mere Mistfortune and casual, which was plainly the meaning of the Words in *Exodus, If a Man ly not in wait, but God deliver him into his Hand,* which could not with any Propriety be understood of Slaughter committed.

And this Matter is clearly explained in the xxxv. Chap. of Numbers, where he who smites with an Instrument of Iron is called a Murtherer; and where it is said, *That he who smites with throwing a Stone, or with a Hand-weapon of Wood, wherewith a Person may die, and he die, the Murtherer is surely to be put to Death.* And then the Law proceeds plainly to treat of Cases, where Death ensues from Strokes or Thrusts of a Weapon not deadly; and there it requires indeed Hatred and Enmity, but if it be done suddently and without Enmity, or in the 23. verse, *with any Stone wherewith a Man may die, seeing him not, and was not his Enemy, nor sought his Harm, then the Congregation*

tion

before the Justiciary Court. 113

son was to judge between the Slayer and the Avenger of Blood. From which 'tis plain, that Slaughter upon Suddenty, even without Forethought or previous Enmity, was capital by the Law of *Moses*, if the Wound was given with a lethal Weapon, except when it was done by mere Chance, as by throwing a Stone whereby a Man may die, the Person who threw it seeing him not, and so at no Time was his Enemy or sought his Harm. And this is the Case mentioned *xix. Chap. of Deut. verse*, where it is said, *Whofo killeth his Neighbour ignorantly, whom he hated not in Time past*, (which is limited by the Example immediately subjoined to Homicide, meerly casual) shall fly into one of these Cities and live.

Now in the present Case, the Nature of the Weapon and of the Wound are such as clearly exclude founding with any Colour upon the Disposition of the Law of *Moses*, tho' the Question were of the Pannel's claiming the Benefit of the City of Refuge. But neither is it an Argument of any Force to plead, that where the Benefit of the City of Refuge was granted, that by the Law of Nature the Crime was not Capital; for the Revenger of Blood could never have been tolerated to kill without the City of Refuge, where innocent Blood was spilt, whereby the Land must have been

H

pol.

polluted, and the Subjects were permitted *impune*, so notoriously to break in upon the established Laws of Nature; and therefore, tho' it is an Argument of unavoidable Force, that wherever by the Law of *Moses*, Capital Punishments are allowed, such Punishments are lawful; but the Argument is not of equal Strength, that where the Powers of the Law were suspended by the *jus asyli*, established by positive Precept, that therefore in Countries where there is no such Privilege, either by the Laws of God, or the Laws of the Land, that there the Punishment is not to be Capital, where the *jus asyli* could have been claimed.

2^{do}. It was contended, that by the common Law, not only *dolus* but *propositum* was necessary, and that Slaughter committed *in petu & rixa* were not to be punished capitally, and to this Purpose, the Authority of the learned *Voet* was cited, who seems to say that in *rixa*, if the Person cannot be discovered who gave the deadly Wound, the ordinary Punishment should not take Place.

But when this Matter is considered, plain, there arises no good Argument for the Pannel from the common Law: For tho' there is a Difference to be made between *propositum & machinatio premeditata*, and sudden Passion and Heat of Drink determining the

Will

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Will to commit the Crime, yet as Laws were made and became necessary, chiefly from the depraved Passions of Mankind, they cannot afford a sufficient Excuse against the ordinary Punishment of an atrocious Crime; and there is *dolus*, when a Crime is even committed of a sudden, altho' there be no Fore-thought: So it is commonly said, that Opportunity makes the Theif, and Theft is committed *impetu*, nevertheless not without *Dole*. Nor is it necessary to prove or libel a Fore-thought in the Commission of the Crime, in the same Manner, Passion or Provocation may unfortunately determine the Will to the Commission of a horrid Crime, but it would be of dangerous Consequence, to allow of Bloodshed, under Colour of Passions, which Men ought to subdue, or of Drunkenness which they ought to avoid, or of a sudden vicious Turn of Mind; and therefore in the *Roman Law*, who ever committed Slaughter *dolo malo*, whether deliberately and upon Fore-thought, or of Suddenty, was to be punished *ex lege Cornelia de sicariis*: And to show that it was sufficient, that the design should only preceed the Act from which Death followed, and not the meeting of the Persons, as the Acts of the Mind are only to be known by external Circumstances, the kind of Weapon in the same Manner as in the Law of *Moses*, was suffici-

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ent to found a Presumption of such Proposition, as joined with the Act of killing, brought the Man-slayer under the *pœna legis Cornelia*. So in the *L. 1. §. 3. ff. ad leg. Cornel. de sic.* it is said, *Sigladium strinxerit, & in eo percusserit in dubitate animo in eum admisisse.* And if prior Fore-thought had been necessary, the kind of Weapon could not possibly have founded a sufficient Presumption. But as it is manifestly made appear, the Intention to kill, whether that Intention to kill had its Birth from Passion or Drink, it was voluntary Slaughter done *dedita opera*; and therefore to be punished capitally.

And the Passage cited from the learned Voet, rather confirms this Doctrine, that if in *rixa*, which must suppose Suddenty, the Person who inflicted the mortal Wound, was discovered, he was to be subjected to the ordinary Punishment. And the same Author §. 9. of that Title observes, that tho' such as commit Slaughter, *calore iracundiae* may be said *impetu delinquere*, yet there *neque judicium, neque assensus animi, neque voluntas deest*. And says, that a Person provoked by verbal Injuries how great soever, was not free from the *pœna ordinaria*.

And the Truth is, if Passion or Provocation were sufficient to excuse Slaughter, it were in vain to lay down the Rules so anxiously conceived in the Laws concerning the *moderamen*
inculpate

before the Justiciary Court. 117

inculpata tutela, where the Slayer must prove that he was *constitutus in periculo vite*. And had the Case stood otherwise in the Roman Law, it could never have been doubted, when Jealousy was the Rage of a Man, and Adultery the highest Provocation against a Husband, and a real Injury.

3tio. It was contended for the Pannel, "That by the Law of Scotland, Slaughter and Murder were of old different Species of Crimes, and only Murder committed upon forethought Felony was properly computed Murder, and punished as such; but that Slaughter committed upon Suddenty, or *Cbaud melle*, and *in rixa*, was deemed only *homicidium culposum*, and not punishable by Death." And to support this Position, several Acts of Parliament were appealed to; by which it was statuted, That Murder was to be capitally punished; but *Cbaud melle*, or Slaughter committed upon Suddenty, was to be punishable according to the old Laws: And that in this Case, if the Pannel had even killed J. K. at whom he aimed the Thrust, in the Circumstances above set forth, it was not Murder upon Fore-thought, but upon Suddenty and high Provocation.

To this it was answered, That this Doctrine, so directly contrary to the received Opinion, had little Countenance from the old Laws

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and Acts of Parliament, less from the constant Practice before the Act of Parliament King *Charles II.* in the Year 1661, and stood in plain Contradiction to this last Law, and the constant Practice, and repeated Decisions of the Court of Justiciary, from that Time down to this Day.

By the old Law, particularly *Cap. 3.* of the first Statutes of King *Robert I.* intituled, *Men condemned to the Death should not be redeemed*, it is statuted and ordained, "Gif any Man, in
" any Time coming or bygane, is convict or
" attainted of Slaughter, Reif, or any other
" Crimes touching Life and Limb, common
" Justice shall be done upon him, without
" any Ransome." Here Slaughter in general is mentioned, and Justice was to be done upon the Person convicted of it, and the Punishment by the Title was plainly Death: So that at common Law, Slaughter in general was capital.

By *Chap. 43.* of the Statutes of King *Robert III.* it is statuted, "That na Man use any
" Destruction, Herships, Burning, Reif,
" Slaughter, in Time to come, under the
" Pain of Tinsel of Life and Goods,"
Whereby the Pain of Death is clearly made the Punishment of Slaughter in general. And in the immediate subsequent Chapter, The Sheriff was to take diligent Inquisition of Destroyers

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Destroyers of the Country, or such as had destroyed the King's Leiges with Hershups, Slaughter, &c. and was to take Bail from them if arrested, to compear at the next Justice Air; and if Bail was not given, the Sheriff was to put him to the Knowledge of an Affize; "And gif he be taynt with the Affize for sick an Trespassour, it is said, he shall be condemned to Death." Which seems only to relate to Man-slaughter, and not to Murder upon forethought Felony, which was one of the Pleas of the Crown, to be tried only before the King's Justiciar, as is evident from *Chap. 11. King Malcom II. his Laws, and Chap. 13 and 15.* Whereas Slaughter might be tried by the Sheriff, where there was a certain Accuser, as appears from *Book 1. of the Regiam Majestatem, Cap. 1. §. 7, 8, 9.*

There are sundry others of the old Statutes that seem plainly to presuppose, that Slaughter was capital, and particularly these of *Alexander II. Cap. 2. §. 3, 4, 5, 6.* And so *Skeen*, in his *Treatise of Crimes, Tit. 2. Cap. 6.* says, *That Slaughter in rixa, or Chaud melle, is generally punished by Death, and Confiscation of the moveable Goods pertaining to the Trespassour; but with this Difference, That the Girth or Sanctuary was no Refuge to him, who commits Slaughter by forethought Felony; but he*

ſhould be delivered to the Judge ordinary, to orderly the Law. Which plainly appears from Ja. V. Parl. 4. Act 23. Whereby Maſters of Girths are ordained to deliver up ſuch Perſons, as are guilty of Murder upon forethought Felony. And it is in vain to found upon Law 90. Parl. 6. Ja. I. which ſays in the End, Giſ it be forethought Felony he ſhall die therefore; becauſe the Act relates to all Maſſayers, and tho' that particular and moſt atrocious Species be mentioned, as that for which the Murderer ſhould die; yet the Argument will not hold, that therefore no other Kind of Slaughter was capital: For it is there ſaid in the general, That if the Slayer is taken with red Hand, the Law ſhall be done upon him within that Sun, which cannot be underſtood of a Crime not capital. And Sir George Mackenzie in his Obſervations upon it ſays, This may ſeem to imply, that Men die not for Murder committed without forethought Felony; but this holds not in our Law; for Murder, tho' committed without forethought Felony, is puniſhable by Death, except it was either caſual, or in Self-defence.

The Act 51. Parl. 3. James I. was improperly founded on by the Pañnel's Procurators; for that Act does no more than extend the Difference between forethought Felony, and *Cbaud melle* to all Tranſgreſſions, as well as Slaughter,

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Slaughter, as Sir George Mackenzie observes upon that Law, where he says, *That Chaud melle, or homicidium in rixa commissum, is capital by our present Law.*

There seems to have been this other Difference too, by the Books of the old Law, between Murder upon Forethought and Slaughter, That the Trial of Murder was summar, whereas Manslaughter could not be tried till after Forty Days, as appears by the Statutes of Robert II. from Chap. 3. to Chap. 9.

After the Reformation, when the *jus asyli*, formerly given to Churches, dropped, the Distinction between Murder and Manslaughter was looked on with less Attention; and Libels were commonly framed indifferently, for Murder and Slaughter in general, without any Mention of forethought Felony; nor was it ever objected, that Malice or premeditate Design was requisite to make the Crime capital; and Criminals were punished to Death, where from the Proof there was not a Colour, or Pretence of Forethought, or any premeditate Design, as will appear from looking into the Books of Adjournal: And many Instances might be given, particularly in the Case of *Jean Currie* against *William Fraser*, the last of July 1641. Where the Pannel was condemned upon an extrajudicial Confession, adminiculated with other Circumstances

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stances; in which he set forth the Fact, That the Defunct and he had some little Quarrel about a Staff; and hearing, that he had murdered his Brother, he came into a House where the Defunct was, and that either the Defunct, or some other that was by, took the Pannel by the Arm to hold him, having freed himself, he aimed a Stroke with a Whinger at the Defunct's Arm, but missing it, he struck the Defunct about the Pap. And upon this Proof he was found guilty and executed.

In the Case of *Bruce* against *Marshal*, the 3d April 1644, Slaughter was libelled, and he was condemned upon his own judicial Confession: From which it appears, that he was so far from having any Forethought, that he suffered not only the greatest Provocation in Words, but was even beat with Hands and Feet by the Defunct, while he was on the Ground; but at last getting up, and (as the Confession bears) being overcome with Passion, he drew a Knife, and struck at him in two several Places of his Body, whereby he died. And upon this Confession, where there was Suddenty, Provocation, and Passion, he was brought in as guilty, and condemned to be beheaded.

The Law remaining somewhat uncertain concerning casual Homicide, and there being

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no longer any Benefit of Girth, as formerly, in the Year 1649, an Act was past, during the Usurpation, for removing all Question and Doubt, that might thereafter arise in criminal Pursuits for Slaughter, ordaining, " That the
" Causes of Homicide after following, *viz.*
" casual Homicide, Homicide in lawful Defence, and Homicide committed upon
" Theives and Robbers, should not in Time
" coming be punished by Death, notwithstanding any Laws or Acts of Parliament, or
" any Practick made heretofore, or observed
" in punishing of Slaughter." And this is past into a Law after the Restoration, in the Year 1661, and at the same Time, all Decisions given conform to this Act, since the 4. February 1649, are declared to be sufficient to secure all Parties interested, as if the Act had been of that Date; which was necessary, because the Acts during the Usurpation had been rescinded. And this Law has ever been lookt upon as the Standart; And the Practice of the Court of Justiciary, since that Time, clearly demonstrates, that Slaughter of Suddenty, and Slaughter upon Provocation, which could not be brought under one or other of the Particulars there mentioned, have been taken to be capital.

The Procurators for the Pannel here observed, " That tho' in the Cases there mentioned,
" ed,

“ ed, the Law ordained Slaughter not to be
 “ capital, yet it neither said nor supposed,
 “ that the former Law, whereby Pannels were
 “ entitled to plead against a capital Punish-
 “ ment, was thereby abrogated, but only sta-
 “ tuted in the Cases there mentioned.

To this it was answered, That the Narrative of the Statute was, *for removing of all Question and Doubt, that may arise thereafter in criminal Pursuits for Slaughter*; and consequently cannot be supposed to have left doubtful Cases, that the Pannel's Procurators must admit were not so clear as casual Homicide, and Homicide in Defence: Nay the Law seems to suppose pretty plainly, that all Slaughter, by the Laws and Acts of Parliament, or Practicks, was capital, not declaring what was Law, from any other Period than the Year 1649, but enacting the same with a *non obstante*, and judging, it necessary to confirm the Decisions that had past, conform to that Act during the Usurpation; which would have been vain, if it had not been at least doubtful, whether casual Homicide, Homicide in lawful Defence, and Slaughter committed upon Thieves and Robbers, did not subject these guilty to the Pain of Death: And if those Degrees of Homicide were so much as doubtful, it is not possible to conceive, that *Chaud melle*, or Slaughter committed *dedita opera*, tho' with-

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without Forethought, was by the Law of Scotland not capital. Or, if it should be supposed to have been doubtful, whether these last Degrees of Homicide were capital, that the Legislator upon a Narrative, that all Question and Doubt that might arise hereafter in criminal Pursuits for Slaughter, should be removed, would have enacted in the clearer Cases, with a *non obstante*, and left the more difficult in the Dark, as surely the greater Advocates for Slaughter on Suddenty must admit, that at least, it is more culpable than either Homicide meerly casual, or Homicide in lawful Defence.

As to the Decisions subsequent to this Law, they will be found intirely agreeable to the Doctrine now laid down. Sir George Mackenzie observes, " That tho' many Lawyers
" are positive, that tho' *homicidium in rixa*,
" even where the Author of the Plea is
" known, may by the Rigor of the Law be
" punished by Death, yet that no Country
" uses this Rigor; yet he remembered, That
" in *William Douglas's* Case this was urged, and
" albeit it was not proven that he was the Killer,
" yet the Assize found him guilty, and he
" thereupon died." This is a Case more favourable, than where the Person that gave the mortal Wound is known, tho' given suddenly, and even upon Provocation; and therefore
shows

shows what our Laws is, and with how little Reason the Procurators for the Pannel maintain their Argment upon the Law of Scotland.

In the Case, his Majesty's Advocate against *Nicolson* the 24th June 1673, Murder and Slaughter without Fore-thought, were charged upon *Nicolson* the Pannel, and his Procurators pleaded the Benefit of the Act of Parliament anent casual Homicide in the several Degrees thereof, he being in a Condition, that he was not able to remember. To this it was answered, that the Defence was not relevant, in regard, the Homicide could not be said to be casual, such as the Case of throwing of Stones over Dykes, and killing accidentally a Passenger: And the Pannel having afterwards proposed a Defence, that being in use to carry a Gun as a Fowler, and calling accidentally for Meat to his Dogs at a Mill, the Defunct fell upon him, and offered to secure him as a *French* Soldier, or fit to be one; in the Struggle, his Gun being a Half-bend, went off and killed the Defunct: Both the Libel and Defence were found relevant, and it appeared upon the Proof, that *Nicolson* was drunk, and that there was no previous Quarrel, but taking Exception at somewhat the Defunct said, he shot him with his Gun, and by the Verdict of the Assize, he was found guilty of the Slaugh-

ter committed upon the Defunct, and sentenced to have his Head struck off in the *Grass-Market*; which shows, that neither Drunkenness nor Suddenty is a relevant Defence against a *pœna ordinaria* in Slaughter.

And in the Case of *Murray contra Gray* 10th June 1678, the Lords found the Libel relevant, and that there was no Necessity of any distinct Probation for proving precogitate Malice, which clearly shows, that Slaughter, other than upon Fore-thought, was Capital. And to show that Provocation and Passion are not received as Defences against the *pœna ordinaria*, a Multitude of Decisions might be brought, particularly in the Case of *Aird*, who was indicted in the Year 1693, for the Slaughter of *Agnes Bayne*, having given her some Strokes on the Side and Belly with his Foot, by which she fell into fainting Fits, and immediately died. The Defence was, great Provocation and casual Homicide: Provocation in as far as she threw a Chamber-pot in his Face, and when he gave her hard Words, she and her Neighbours fell upon him, and beat him, upon which he gave her the Strokes above-mentioned. And in that Trial it was argued, there was no *animus occidendi*, no previous Malice, no mortal Weapon; and the Texts from *Scripture* urged in Defence of the present Pannel, and the Arguments from the
civil

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civil Law, and from our own Acts of Parliament were urged; nevertheless, the Lords found the Libel relevant, repelled the Defences, and upon the Proof he was sentenced to die.

In the Case of *William Carmichael*, in the Year 1694; Drunkenness was founded on to excuse a *pœna ordinaria*, and Fore-thought was neither libelled nor proven, and the Lords found the Libel relevant, and upon the Proof, he was sentenced to be hanged.

In the Year 1695, *George Cumming* Writer in *Edinburgh* was indicted for the Crime of Murther or Man-slaughter of *Patrick Falconer*. The Defences now offered for the Pannel upon the Distinction in the old Law between Fore-thought and *Chaud melle* were offered; nevertheless the Libel was found relevant, and the Assize returned a Verdict guilty of Man-slaughter, upon which he was condemned to die.

In the Case of *Burnet of Carlops* the 22. *January* 1711, tho' a Defence was sustained, yet the Libel without Fore-thought was found relevant. And in that of *Hamilton of Green* the 30th *June* 1716, the Pannel offered to prove, that he was accidentally at the House of *Thomas Arle*, of whose Murder he is accused, at the Day libelled, with some of his Acquaintances, and had no deadly Weapon along with him, that he became inebriated

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to a great Degree, and having left the House, and returned to ask for the Slip or Cover of the Sheath of a Sword, the Defunct gave him most indecent, injurious and scurrilous Language, and persisting in it, the Pannel pushed or struck at him with his Sword, having the Scabbard thereon, that he had Reason to believe had a Crampet upon it: And being still more and more provoked by repeated injurious Words, to protect himself from further Insolence he had Reason to look for, the Pannel still remaining a Horse-back, the Defunct rush'd himself upon the Sword. And this circumstantiated Fact was offered to be proven. Nevertheless the Libel was found relevant, and the Pannel's hail Defences repelled, and upon the Proof, was sentenced to have his Head severed from his Body, and was accordingly beheaded.

In the Case of *Thomas Ross* and *Jaffrey Roberts* the 20th of *July 1716*, it was pled for the Pannel, that being Recruits lately come from *England* to *Scotland*, and not knowing the Way, they asked the Defunct the Road to *Edinburgh*, who refusing to show it, and one of the Pannels expostulating with him, why he treated a Stranger so that came to serve the King? He uttered very disrespectful Words with Respect to his Majesty, and one of the Pannels having called him Villain for such opprobri-

ous Expressions, he came up to *Ross*, and with his Fist gave him a Blow on the Face, and then pulled him down to the Ground, and beat him with a great Stick to the imminent Danger of his Life, saying, That he should never go alive out of his Hands, and *Roberts* having come to his Assistance and rescued him a little, *Ross* the Pannel gave the Defunct a Wound with a Knife whereof he died. *Ross* pleaded, there neither was nor could be Forethought Felony or premeditate Malice against a Person whom he had never seen before, that it was committed upon Suddenty, that he had the highest Provocation, both verbal and real. Nevertheless, by the Interlocutor, *Ross* the Pannel his giving the Wound was found relevant to infer the Pain of Death. And the Defence from Provocation by Words, and receiving a Blow on the Face, being pulled down to the Ground, and beat with a great Stick to the Danger of his Life, jointly sustained relevant to restrict the Libel to an arbitrary Punishment, was found to be elided by the Reply, that at the Time of giving the Wound to the Defunct, the Defunct's Hands were held by *Jaffery Roberts* the other Pannel. From whence 'tis evident, that Slaughter upon Suddenty in *rixa* or *chaud melle*, and by a Person who had received the greatest verbal and real Injuries, even beyond that of being thrown

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into a Ditch, of the Nature that is set forth into which the present Pannel was thrown, is by that Interlocutor *homicidium dolosum*, and not *culposum*, but Capital.

And in the Case of *Davidson* the Soldier, in August 1726, Slaughter upon the greatest Suddeny was sustained, and he was upon the Proof executed.

And the Case of *Brock* and *Lindsay* in 1717. determines this Point beyond all Dispute. These Pannels were accused of the Murder of one *Anderson*, and as the Libel did expressly set forth, a Quarrel and a Struggling betwixt the two Pannels and the Defunct, which made it directly an *Homicidium in rixa*, so the Pannels, at least *Lindsay*, offered a pretty strong Defence, namely, that the Defunct; without any Provocation, justled them, and struck at *Lindsay*, and beat him down to the Ground; and it was while they were on the Ground that the Wound was given. And the Defence was pled for two several Purposes. *First*, That the Crime was not capital, because no Forethought Felony. And *2dly*, To intitle them to the Act of Indemnity, under which all Homicides were included, except wilful Murder and Slaughter of Fore-thought Felony. And the Interlocutor on the Relevancy, was in thir Words, "Find the Pannels, or either of them, at the Place and Time libelled, their giving *Archibald Anderson*

“ *Anderson* a Cut or Wound in the Neck or
 “ Throat, or other mortal Wound, with a
 “ Knife, or other mortal Weapon, whereof
 “ he the Defunct soon thereafter died; or
 “ that the said Pannels, both or either of them,
 “ were Art and Part therein, relevant to infer
 “ the Pains of Death and other Pains libelled :”

And repell the hail Defences for the Pannels, excepting that Defence pled upon his Majesty's gracious Act of Indemnity, anent which the said Lords superceded to give their Judgment, till the Conclusion of the Probation and Return of the Verdict.

This then is an undoubted Authority, that Homicide may by the Law of *Scotland* infer the Pain of Death, though it be neither wilful Murder, properly so speaking, nor Forethought Felony, otherwise the Court could not have found the Crime relevant to infer the Pains of Death, and at the same Time reserve the Consideration, whether there was any Forethought Felony or not.

Upon this Interlocutor a Proof was adduced, and a Verdict returned, finding *Lindsay*, one of the Pannels, guilty; and yet the Court having resumed the Consideration of the Indemnity, found him intitled to the Benefit of it; that is, in other Words, they found the Crime was neither voluntary Murder, nor Slaughter of Forethought Felony. So that

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'tis plain, had not the Indemnity interveened, *Lindsay* must have suffered Death for Killing, tho' there was no previous Design or Forethought.

And an Interlocutor upon the Relevancy, much to the same Purpose with the former one, was also pronounced 31. of *August* 1721, in the Case of *Samuel Matthews* a Soldier, where the Libel was found relevant to infer the Pain of Death, reserving the Consideration of an other Act of Indemnity then pled for the Pannel.

2do, It was offered, what indeed is alone applicable in the present Case, that if the Pannel intended only to wound or kill *J. K.* and by Misadventure, the deceased *G. D.* was wounded, and of that Wound he died, the *pæna ordinaria* was not to be inflicted.

It was answered, that according to the Rules of the civil Law, he who intending to kill One, kills another, is nevertheless subject to the *pæna ordinaria*. And the learned *Matthews lib. 48. tit. de sicariis §. 12.* gives the same Opinion, observing, that the Act is consummate. There is the *animus* or Design of Killing and Death: That it would be a ridiculous Defence, that the Pannel intended to steal the Goods of one Man, but happened to steal those of another; or against Adultery, that he intended to defile one Man's Wife, and

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happened to light upon that of another. And he thinks 'tis as unreasonable to hope for Safety from this Defence, that the meaning was to kill one, but another received the Stroke and died.

That it is not always necessary, that the Intention should be directed towards the Mischief done in order to inflict the Pain of Death must be evident from looking into the *xxi. Chap. of Exodus 22, and 23. ver.* Where, *if a Woman with Child is hurt when Men are striving, and if Mischief follow, Life is to be given for Life.* And the kind of Killing now in Question was plainly such as according to the Law of *Moses*, would not have intitled the Slayer to the Benefit of the City of Refuge. For though, in the *xix. Chap. of Deuter. 4. verse,* *Whofo killeth his Neighbour ignorantly, whom he hated not in Time past,* is said to be intitled to that Privilege, yet this is limited immediately with an Example of Man-slaughter merely casual.

The Procurators for the Pannel insisted,
 " That this kind of Killing was intirely casual,
 " beyond, and without the Intention of the
 " Party: That in the Case of *Masson*, in the Year
 " 1674, *Burnet of Carlops* and several others,
 " where it appeared there was Intention to kill,
 " the Punishment was mitigated. "

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It was answered, That where from the Nature of the Weapon and Means by which the Wound was given, taking all the Circumstances together, there was no Evidence or Presumption, that the Pannel intended Death to any Person whatsoever; and the *Propositum* was neither proved, nor could be presumed, as in the Case of *Masson*. And in that of *Burnet of Carlops*, where Persons having Swords only struck with Staves, it was held as approaching towards a casual Homicide. But that can never be pretended when the Wound given as libelled was so clearly mortal, and the Instrument the most lethal.

It was further contended for the Pannel,
“ That as *animus occidendi*, and Death following,
“ are admitted to be necessary in order to inflict the highest Punishment, so as from the
“ Circumstances mentioned in Exculpation, it
“ is evident, that there was no Intention against
“ the Defunct; and it cannot be known, whether the Pannel’s Design was to kill *J. K.*
“ since he was not killed, or if the Wound
“ would have been mortal had the Durk
“ reached him; and consequently the necessary
“ Requisites to constitute a Murder were not
“ to be found here. ”

It was answered, That the Invasion with a mortal Weapon, with which the Defunct was killed, was a sufficient Proof in Law, that

the Invader intended to kill, since Death followed; and that there is no wounding by Measure and Certainty not to kill. The Act implies *Dolus* and Malice, which with Death following, makes Murder without any further Proof of an Act of the Will to kill; and there would have been as little Evidence that the Pannel intended to kill J. K. if he had actually received the Wound and died. Because it was possible the Poinard might have pierced farther than he intended: And if he did not design to kill J. K. and killed the Defunct, he must have been the Person against whom the Mischief was directed; As indeed it may be argued from the Rage and Drunkenness pled in Excuse and Defence. 'Tis possible, that he intended to kill whomsoever he met with; and if Rage from Passion and Drink is allowed to palliate Murder, 'tis impossible any one can be safe; and these very Circumstances, without which the Defence has not a Colour, must at the same Time give Evidence, that the Pannel's Intention of pursuing J. K. with a Poinard, was to kill and destroy him, for he pleads them to excuse his Killing of the Defunct, as sufficient Provocations to incite him to it.

The Law of *England* was frequently mentioned, by the Procurators for the Pannel, in the Pleading, as what would justify the Arguments

guments brought for them; and particularly it was said, *That all Killing of a Suddenty, by that Law, was only Man-slaughter, and not Murder.* But the contrary will appear, by looking into *Hawkin's Pleas of the Crown, Book 1. Chap. 31. of Murder*, where he clearly distinguishes between deliberate Murder, and Murder committed on a Sudden.

It would appear by the Law of *England*, That if there is Provocation, in some particular Cases, sufficient to alleviate the Act of Killing, it reduces it to a bare Homicide: But then no Provocation from Words is ever sustained, nor even Assaults, but upon this Ground, that he who was affronted or assaulted might reasonably apprehend, that he that treated him in that Manner, might have some further Design upon him, which resolves the Matter into a Kind of self Defence. And in this the Law of *England* differs from the Law of *Scotland*, which requires in order to lawful Defence, and Killing under the Notion of Danger from the Assailians. But then there is no Pretence of apprehending dangerous Consequences, when the Party killed, or intended to be killed, was flying, and had no Weapon, as in this Case; and the Passion in such Circumstances resolves it self simply into Revenge, which no Law ever sustained to

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to alleviate or palliate Murder ; for there the Malice prepenſed is clear and evident.

But then if it be conſidered, in the preſent Caſe, That the Party affronting or invading, is not only ſet forth to have fled, and to have had no Weapon in his Hand, but that he eſcaped. What Colour is there, upon theſe Principles, to alleviate the Killing of a Perſon interpoſing to prevent the Miſchief, when there was no Reſiſtance, upon the Part of any Perſon whatſoever ; as in the Caſe of a Combat, and where it was voluntary, as to the Perſon giving the Wound, in regard he could have ſtopped when J. K. fled ?

It appears pretty evident, That by the Law of *Scotland*, the Circumſtances offered in Exculpation afford, by the Law and Practice of *Scotland*, no relevant Defence, ſuppoſe the Perſon killed had been the Provoker, much leſs in the Caſe, where the Perſon killed generously interpoſed to prevent the Miſchief, having given no Colour or Cauſe of Provocation, having no Weapon, and where the Perſon, againſt whom the Invaſion is ſaid to be meant, was without drawn Sword and flying: The Murder in theſe Circumſtances muſt have proceeded, either from Rage and Revenge, which no Law can ever favour, ſince Laws were made, and Judges appointed, that private Perſons ſhould not attempt judging in
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their own Case, and to bridle the unruly Passions of Men, or from set Purpose and Design, to kill the Defunct from former Resentment.

In Respect whereof, &c.

D. F.

INFORMATION for *C. D.* of ———
Prisoner in the Tolbooth of *Edinburgh*,
Pannel,

AGAINST

His Majesty's Advocate for his Highness Interest.

THE said *C. D.* stands indicted before your Lordships, of wilful and premeditate Murder and Homicide, in so far as, having a causeless Ill-will and Resentment against the deceased *G. B.* and on the Day libelled, did, with a Durk, Poinard or some other mortal Weapon, without any Manner of Provocation, wound the said deceased *G. B.* below his left Pap, opposite to his Heart, where-
of

of he immediately died; and thereafter did drag him to a Pond near by, where he threw him in, and when milled, was there found dead.

The Defence insisted upon for the Pannel was, That the Act of Killing is not Murder, nor capital, where there is no Malice, nor Forethought against the Person killed, either proved to have been conceived and retained, at any Time preceeding the Act of Killing, or presumed from the Circumstances, to have preceeded the Act immediately before the committing of it: But in this Case, there is no antecedent Malice specified or libelled: And therefore it must be taken for granted, that there was none. And as to presumed Malice immediately preceeding the Act, that the Circumstances intirely exclude that Presumption. *First*, Because, as the Fact is laid, any Blow or Push that was intended, was made at, and designed for J. K. and not against the Defunct: And since the *initium facti* is to be considered, as well as the Event, a Push begun, and intended against J. K. could never be the Foundation of a Presumption of Malice against the Defunct, without which the Killing could not be capital; but in this Case was meerly casual and accidental. *2do*. That the Pannel could never be more Criminal, in having killed the Defunct

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Defunct, by a Thrust directed at J. K. than he would have been, if he had killed J. K. himself: But so it was, That if he had killed J. K. after the Provocation given in Manner foresaid, that it would have been constructed only as casual, or culpable Homicide without Forethought, because done *ex incontinenti, et ex subito impetu, et calore justæ iracundiæ*; yea in some Measure in self Defence, since the Pannel having been thrown into the Ditch, even to the Danger of being suffocated, he had Reason after that, to expect the worst from J. K. since no Gentleman will throw another into a Puddle, who is not supposed to be ready to go further, as he cannot but expect the strongest Retortion of the Injury. And that the Pannel had the more Reason to think so, that J. K. immediately betook himself to the Defunct's Sword, and endeavoured to pull it out, having none of his own. In such Case the Pannel was to expect the worst, and so was in some Measure in his own Defence, altho' he may have exceeded the *moderamen inculpatae tutelæ*; which Excess in such Circumstances would not be punishable by Death, but only by an arbitrary Punishment.

And in Support of this Defence, The Council for the Pannel shall, now in this Information, endeavour to follow the Information given in for the Pursuer. And, 1^{mo}. To shew

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ſhew your Lordſhips, That killing in ſuch Circumſtances was not capital, by the Divine Law, or Law of *Mofes*. 2^{do}. That it was not capital by the Common Law. 3^{io}. That it was not capital by our ancient Law. 4^{to}. That our ancient Law, in that Particular, is not altered by the Statute of King *Charles II*. 5^{to}. That the Practice of the Court is not inconfiſtent, but agreeable to what is here pled. And, 6^{to}. That the Laws of our neighbouring Nations are, for moſt Part, conſonant to theſe Principles, as well as the Judgment of foreign Courts.

As to the Law of Nature, one of the firſt Principles ſeems to be, That every Action muſt be conſtrued and regulated, from the Intention of the Actor. Every Action whatever, except in ſo far as it is conjoined with the Will and Intention of the Agent, differs in nothing from the Action of an irrational Creature; yea, if we may ſo ſpeak, as to call the Operation or Impulſe of an inanimate Creature an Action, the Actions of Men, ſeparated from his Intention and Deſign, as a rational Creature, differ in nothing from the Actions of Brutes, or the Impulſe of Things inanimate; and conſequently that Action, be what it will, can neither be Crime nor Vertue; it is a mere Impulſe or Motion, not properly ſubject to Laws or Rules. But then,

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indeed, when it comes to be conjoined with the Intention, or which is the same Thing, considered as the Action of a rational Agent, there it comes to be subject to Laws, to be considered as criminal or virtuous; or, if it appear to be accidental, so as to have depended upon no Will nor Deliberation of Reason, then it returns to be of the Nature of the Act of an irrational Creature or inanimate Substance, and is subjected to no Penalty, nor yet capable of receiving a Reward. The plain Consequence of which is, that it is the *animus* alone that determines the Nature of the Act: And, if the *animus* or Intention was criminal, then by the Law of Nature, the Action it self amounts to a Crime. On the other Hand, if it be good and vertuous, the Act is laudable by the Law of Nature, supposing even a bad Consequence should follow: But, if the Action truly arise from no Intention, or Principle governing that Action, it is neither laudable nor punishable, it returns to be of the Kind already mentioned, the same with the like Act of an irrational Creature, or the Impulse of an inanimate Substance, moved by a Cause extrinsick to it self. And the Consequence of all this is, That by the primary Law of Nature, the Intention must make the Crime: And therefore, if there appear no Intention to commit that particular Fact,

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Fact, which happens to be complained of, it is not a Crime; notwithstanding of a bad Conſequence, it is conſidered as a Fatality.

And the Application is plain to the preſent Argument, That if the unfortunate Act of Killing the Deſunct, did not flow from any Intention to him directed, then that Act is not by the Law of Nature a criminal Act, however the antecedent Acts directed againſt another may be criminal.

That the Intention directed towards the Act committed muſt govern the Action, ſo as to render it criminal or not, according to the firſt Principles of the Law of Nature, ſeems to be pretty plain by the written Law of God, as delivered by *Mofes*, with regard particularly to the Queſtion of Manſlaughter. The Queſtion is, What was to be the Punishment that was ſo to take Effect? If the Punishment was to be ſtopt in that Form, by flying into a City of Refuge, the Principle of Law is the ſame, as if the Effect had been to be ſtopt in any other Way. And juſt ſo, it is the ſame Thing as to our Law, whether the Manſlayer was to be ſafe, by flying into Girth or Sanctuary, according to the old Law, or now to be ſafe by a judicial Abſolvitor, or Reſtriction of the Punishment. And with regard to the Law of neighbouring Nations, it is all one, whether a Man is to be freed

freed by *Benefit of Clergy*, or such other Form, if he is to be free. The Foundation Question is only, What was that that necessarily falls to be inflicted upon a Homicide, or such or such a Kind; and, as in this Case, upon a Homicide committed without Forethought, or malicious Intention directed against the Person that hath suffered? And therefore, if by the *Mosaick Law*, one in the Pannel's Circumstances was to have the Benefit of a City of Refuge; the Argument concludes, that, by that Law, he would not have been subjected to the Pain of Death.

In the xix. Chap. of *Deut.* the Cities of Refuge are appointed to be separated in the midst of the Land, that every Slayer may fly thither. And this is the Case of the Slayer, which shall flee thither, that he may live: Whoso killeth his Neighbour ignorantly, whom he hated not in time past. By this Text your Lordships see these two are conjoined, as explicatory of one another, ignorantly, whom he hated not in time past; and so the Word *ignorantly* is put in Opposition to *Hatred in Time past*; and by that Means the Sense is plain, that by *ignorantly* is not meant, without knowing that he kills his Neighbour, but without a Foreknowledge, a Foresight and Design, in which Sense, Knowledge is most frequently taken: Because it is impossible to maintain, That if a Man ignorant-

ly kill his Neighbour, even whom he hated before, taking the Word *ignorantly* in that Sense, of his not knowing that he kills him, or killing him by mere Accident, without his Knowledge, can be liable as a Murderer; because it is impossible to conjoin even previous Enmity with accidental ignorant Killing, so as to make out a Crime of Murder; that were exceeding inconsistent with every Principle of Reason, far more with a Law flowing from infinite Perfection. But then the Matter is fully explained, by the 11. Verse of that same Chapter, which determines when a Man is not to have the Benefit of the City of Refuge. *But if any Man hate his Neighbour, and ly in wait for him, and rise up against him, and smite him mortally that he die, and flyeth into one of these Cities: Then the Elders of his City shall send and fetch him thence, and deliver him into the Hand of the Avenger of Blood, that he may die.* Here are both Sides of the Question put, the one fully to explain the other, the last to explain what is meant by *ignorantly*, *whom he hated not in time past.*

The last Text does by no Means say, that if a Man smites his Neighbour whom he knoweth, although without Hatred, and without lying in wait, and without rising up against him, that he shall surely die; but on the contrary, puts the Issue of his dying upon his

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his hating of him whom he killed, and upon his rising up against him, whom he did kill, and upon his lying in wait, that is, in other Words, upon his designing to take his Opportunity from a premeditated Malice; for indeed the Meaning cannot be, that a formal lying in wait, or lurking in a Passage where the Person was to pass; but he who designs the Thing, and takes his Opportunity, *lies in wait*, in the plain Sense of the Text: Besides, the Word *ignorantly* very plainly imports and carries under it, that Case of a Man's killing by Misadventure, one whom he did not intend to kill, that is plainly Ignorance, as to him who was killed, and yet it will be true, that if he designedly kill one in Place of another, mistaking the Person, but designing to kill that Person, as supposed to be the other, he does not ignorantly kill the Man whom he does slay; he kills him knowingly, altho' he mistake the Man:

Nor is it of any Importance, that the Examples immediately subjoined in the 5. Verse, are Instances of Slaughter intirely accidental, and where the Slayer did really not know that he killed; that is an Example, but not an Example exhausting the Rule, which the 11. Verse fully clears, as not extending the capital Punishment to all who came not under the Description in the 5. Verse. But to

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those alone who *hated their Neighbour, lay in Wait for him, and rose up against him.*

And tho' this is plain enough from that Part of the Law, yet the Matter is indeed more fully explained, in the xxxv. Chapter of Numb. where there is another Ordinance, as to Cities of Refuge, and they are appointed to be Six; and the general Rule is set down, *That every one that kills any Person unawares may fly to these Cities.* Nothing can be plainer, than the Meaning of *killing unawares*, that is, without Deliberation, unexpectedly and without Forethought.

After this the Text goes on with an Enlargement of that general Law, *And if he smite him with an Instrument of Iron (so that he die) he is a Murderer, &c. And if he smite him with throwing a Stone (wherewith he may die) and he die, he is a Murderer, &c. Or if he smite him with a Hand-weapon of Wood (wherewith he may die) and he die, he is a Murderer.* These are the Amplifications; but then follows the Limitation in the 20. Verse, *But if he thrust him of Hatred, or burl at him, by lying in wait, that he die, or in Enmity smite him with his Hand that he die, he that smote him shall surely be put to death; for he is a Murderer, &c.* Here is the Limitation, *He that killeth or thrusteth with an Iron-weapon, is a Murderer,* under the Limitation introduced by the

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Particle *But*, as an explicatory Exception to the Generality of the Rule; *But if he thrust him with Hatred, he is a Murderer.* And therefore Commentators refer from this Text to the other in *Deuteronomy*, already cited, for Explication of this: Where it is statuted, *That if a man hate his Neighbour, and rise up against him, and smite him with Hatred, so as to comprehend every Manner of Killing with any Weapon; and consequently that this is not a distinct Manner of Killing, from what is expressed in the 16. Verse, but a Quality adjected to the Manner of Killing, so as to make it capital, viz. That it must be done in Hatred.* And this is yet more clearly explained, by the 22. and following Verses, where the Opposition is stated betwixt thrusting suddenly and of Enmity, with a direct Reference to the 16, 17 and 18. Verses. *But if he thrust him suddenly without Enmity, or have cast upon him any Thing, without lying of wait, or with any stone wherewith a man may die, seeing him not, and cast it upon him that he die, and was not his Enemy, neither sought his Harm, then the Congregation shall judge, &c. and shall deliver the Slayer out of the Hand of the Avenger of Blood.* There all the three Methods of Killing before mentioned are referred to, *Thrusting*, properly applicable to the Killing with a Durk, &c. but without Enmity; *casting* any
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Thing upon him, without lying in Wait, or Forethought; or with any *stone, wherewith a Man may die*, the very Thing expressed in the 17. Verse, and from which he is deemed to be a Murderer: Yet if *he was not his Enemy, nor sought his Harm*, he is not a Murderer, he is not to die, but *to be delivered from the Avenger of Blood*. So that these three last Verses are a plain Limitation of all that went before; the Instrument, whatever it was, was to raise a Presumption if a mortal one; but yet, if it appear the Person was not thrust, or hurled at, or smitten in Enmity, &c. *the Slayer was to be delivered from the Avenger of Blood*.

What hath been already said, does fully obviate what is offered in the Pursuer's Information, in Way of Answer. It is true, That the general Rule in the divine Law is, *That whoso sheddeth Man's Blood, by Man shall his Blood be shed*; and so by the *Six Commandment*, the Prohibition is general, *Thou shalt not kill*: Yet even the Commandment it self admits of Exceptions, such as, Killing in Self defence, and Killing in Execution of Justice, and Killing in Prosecution of just War, and the like. The other Rule likewise admits of Exceptions, not so as entirely to justify the Killing, and to make the Act lawful; but yet so as to excuse from the Pain of Death. The Texts already
noticed

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noticed are express, that a Man's Blood may be shed, and yet the Blood of the Shedder not be required on that Account. The Question is, Whether this Pannel's Case comes not under the Exceptions?

The Position, "That by the Law of *Mosses* Death of a Suddenty was plainly capital; and that the Slayer had the Benefit of the City of Refuge only, where the Slaughter was by mere Misfortune," is assumed without sufficient Foundation. It is plain, That he who thrusts without Enmity, does not kill the Man by mere Casualty; the Act from which Death follows is a voluntary Act, tho' without Enmity, and altho' the Killing is voluntary; and so can never be said to be merely casual, in the Sense the Pursuers would take the Words. Neither are the Words in *Exodus*, *If a Man ly not in wait, but God deliver him into his Hand*, in the least contrary to what hath been advanced: For it is most properly said, That where the Act is without the Design of the Killer, without Enmity, and without Hatred, that there, in so far as concerns the Killing, God hath delivered the Man into the Hand of the Slayer. The plain Meaning is, That where a Man is killed, not with Design, but that the Thing happens by the over-ruling Hand of Providence, permitting Things of that Kind, in his sove-

reign Wisdom, and from his supreme Powers, that there the Person is delivered to Death, by the over-ruling Hand of God.

It is likewise a Position assumed without Reason, "That wherever a Man was killed by a mortal Weapon, that was Murder by the *Mosaic Law*." We hope we have demonstrated the contrary already. If Enmity and Forethought was required (we need only repeat that one Text, which expresses the *killing a Man with a Stone, wherewith he may die*) there the Text declares the Stone to be a mortal Weapon; yet for all that, in case of the Circumstances mentioned in the other Verse, the Slayer was not to die; but *to be delivered from the Avenger of Blood*. And this single Consideration must be sufficient to refute such a Position. Is it not possible for a Man, to use a mortal Weapon, where there is no Enmity, nor Design to kill the Person who is slain? If it be possible, as it certainly is, then can we imagine that a Law, so perfect as the Divine Law it self, could make a Man guilty of Murder, because of the Use of such a Weapon, where he really intended no Harm, than a Man that used a Weapon of another Kind? Besides, that in Truth every Weapon is a mortal Weapon, with which a Man may be killed: And therefore to imagine, That the Divine Law laid such a Difference betwixt an Instrument

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Instrument of Iron, and one of another Kind, is certainly to go too far. The Law of God has put the Matter upon a much juster Footing, to wit, the Intention of the Person, which alone can distinguish his Actions.

The Pursuers also say, "That tho' the Argument is good, that wherever the Benefit of the City of Refuge was not competent, there the Crime was capital; yet it does not follow, that where the Power of the Laws were suspended by the *jus asyli*, that the Punishment is not to be capital in a Country where the *jus asyli* takes no Place."

But with Submission, this is no sound Way of Arguing; the Question hitherto treated is, What was the Law of *Moses* with regard to Punishments in the Case of Man-slaughter? If the Punishment in any Case was not capital, because of the Privilege of the *Asylum*, the Conclusion is just, That the All-seeing GOD did intend such Punishments should be inflicted for such an Offence; and the Form of granting the Protection from the Punishment, does not alter the Substance of the Law.

The next Point undertaken to be illustrated is, "That Man-slaughter under such Circumstances as occur in the present Case, was not by the common Law punishable by Death." And this Argument must be divided into several

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“verbal Branches. Such as. 1^{mo}, That culpable
 “Homicide was not so punishable, and that
 “Homicide committed upon such high Provo-
 “cation as was here given by J. K. could a-
 “mount to culpable Homicide only. 2^{do}, That
 “by that Law, the Defunct not having been in-
 “tended to be killed, but the Invasion, what-
 “ever it was, intended against another, the kill-
 “ing the Defunct was casual, or at worst cul-
 “pable, not punishable with Death.”

And as to the first of these Points, we shall not trouble your Lordships with Multitude of Laws and Opinion of Lawiers that might be adduced upon the Point, but only take notice of some of the most remarkable, and which seem most apposite to the present Case. Amongst other Authors that might be cited for supporting this Opinion, is the learned *Voet*, ad tit. ad Leg. Com. de sic. N. 9. That one killing another who has provoked him only by a verbal or slight Injury, *vix est ut ab ordinaria pœna absolvendus sit*, he adds, That if the Provocation was by an atrocious real Injury, that would be sufficient to mitigate the ordinary Punishment; and to confirm that, cites *Mattheus*, &c.

And indeed we apprehend, this Opinion is founded in the first Principle of Nature, for scarce any humane Constancy can suffer such high real Injury without the Passions being in-

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inflamed: And altho' killing is no doubt an Excess in the Retortion of a real Injury, yet still it is but an Excess, and the Injury shows the Thing done without Design; and therefore, because of insuperable humane Weakness, the Punishment falls to be mitigated. And the Application to the present Case, as we apprehend, is obvious. *J. K.* had given the highest Provocation to the Pannel, not only by a Tract of verbal Injuries and Endeavours to pick a Quarrel, but had committed the most provoking real Injury, to throw a Gentleman over Head and Ears in a dirty Puddle: No Injury could be more provoking. Yea indeed, there was more in it than an Injury only; one that was able to throw the Pannel into the Puddle in that Manner, was likewise able to have suffocated him there, the Pannel had no Reason to expect otherwise, and therefore no wonder if he betook himself to his Durk, &c. And the other Circumstance noticed, that *J. K.* immediately upon doing the Thing, endeavoured to draw and make himself Master of the Defunct's Sword, gave the Pannel ground to expect the worst; and so it may be doubted, if he was obliged to wait till *J. K.* should have an Opportunity to give him the Blow, even with a mortal Weapon. And when this is considered, the Fact goes further than a Retortion of the highest Injury: The Pan-

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Pannel was in some Measure put upon his Defence; and granting, that his pushing at *J. K.* was an Excess, yet still that Excess falls only to be punished *pœna extraordinaria*.

From what is said, it seems plain, That it *J. K.* received the Thrust, the Homicide would have been culpable only: And so it remains to be considered, if the Case comes out worse for the Pannel, because it was *G. B.* that received the Wound and not *J. K.* And we apprehend it does not, but on the contrary, that this gives a great Strength to the Defence. And that because, *imo*, That the Thrust being designed at *J. K.* shows that there was no Malice at the Defunct, neither premeditated nor presumed from the giving of the Wound: For admitting it to be true, that in an ordinary Case, the giving a Wound with a mortal Weapon, presumes the *Dole*, or malevolous Intention; yet that can never be, where the Push is pointed at another than him, who by Fatality receives it. And so the Case comes out thus, that the Pannel in making one Push, could not design it at two Persons, and so if he designed it at *J. K.* 'tis impossible to say, he had a Design against the Defunct. It is plain in the Nature of the Thing, that the Design, though presumed from the giving of the Wound, yet in Point of Time it preceeds the actual receiving of the Wound, although

although that preceeding or Precedence be but Momentary; and therefore, if in the very Act of pushing, the Design appears to have been against J. K. it excludes all pretence of any *animus* against another who received the Wound by Fatality, in the very Moment that the Design was pointed against the other.

And here your Lordships will likewise observe, that there can be no *animus occidendi* presumed at all against any Man, not even against J. K. himself; because the drawing a Sword and pushing at a Man with it, does not of it self presume a Design to kill the Man pushed at, except the Wound and Death actually follow: For it is from the Event of the Wound and Death following alone, that the Intention is presumed. Therefore since Death did not happen to J. K. the Law cannot presume an Intention to kill him, since the Foundation of the Presumption is removed, or did happen. If the Blow had missed him, or had not killed, but wounded him; the Intention would not be presumed: And therefore it cannot here be presumed, as the Case happened, for there is no such Presumption in Law, as that killing one presumes a Design to kill another; except where it appears that the Slayer killed one Man by Mistake, taking him to be another: As for Instance, Killing C. G. in the Dark, when the Killer really believed

lieved him to be *G. B.*; there indeed the killing of *C. G.* presumes the Intention of killing *G. B.* although he was not actually slain; and therefore 'tis in that Case, the Killer is indeed guilty of Murder. But it is quite another Case, where one Man is killed, not by Mistake for another, but by Fatality, when the Push was intended at another, whom the Killer knew, which is the Case in Hand: And therefore we do humbly insist, That it cannot be said, there was an Intention to kill *J. K.* since his Death did not follow: Neither can it be said, There was an Intention to kill the Defunct, because though his Death did most unluckily happen, yet the *initium*, upon which the Intention must be founded, did not happen, the Push being made at *J. K.* For these two must always concur, the Push made at the Man who dies, and the actual Death. And where it happens otherwise, the Death is a mere Fatality; not intirely innocent, because the Killer was so far faulty in invading the other; but then it is no more than an Invasion, it is not Murder from Malice presumed. No Presumption of Law can get the better of contrary Evidence. The Presumption of Law may be, That where a Man is killed, he was intended to be killed; but if from the Circumstances the direct contrary appear, that there was not an Intention
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against him, this is Evidence which excludes the Presumption; and so there can be no Murder in the Case.

It is indeed a Case stated by the Lawyers, What should be the Consequence, if a Person intending to kill one Man, kill another? It is acknowledged they are greatly divided upon the Question; a great many of the ablest are in all Cases clear, That where one Man is killed, and another was designed, it cannot be Murder, because of the want of an Intention against him.

But then your Lordships will observe, That all Lawyers agree in this, that wherever a Man is to suffer for killing one, when he intended to kill another; that can only be where the Forethought and *dolose* Intention to kill the other is certain, but not that where Invasion is *ex impetu*: And therefore supposing one invade another, with an Intention to hurt, but without a certain Evidence that his through Intention was to kill, there supposing the Blow intended for one do kill another, the Killer cannot suffer Death: And which by the By shows your Lordships, that there is no such Punishment in Law, as that because the Puss killed the Defunct, therefore the Pannel intended to kill J. K; for if this were Law, then the Question could never occur, but would be inept whether a Man intending to strick
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one, and killing another with that Blow, is guilty of Murder, or is presumed to have intended to kill that other at whom the Stroke was intended?

Upon all these Grounds, we humbly insist, that if *J. K.* had been killed, there would have been no Place for a capital Punishment. But then separately, whatever be in that, that since it does not appear, (nor cannot, since Death did not follow) that there was a certain Intention to kill him, the casual killing of the Defunct cannot be punishable with Death.

What has been said fully removes any Argument that may be drawn from Sir *George M^rKenzie*'s Opinion, that he who by Mistake kills one for another, should die: For your Lordships see, that he speaks only of that Case, when one Man is certainly intended to be killed, but another is killed by Mistake, being supposed to be him; that is not the Case now before your Lordships.

And in this Question, concerning the Pannel's Intention and Design, the Circumstance of his being overtaken with Drink, is a Circumstance that assists in the Argument. We do not say, that being drunk affords a Defence for Killing; nevertheless it is a Circumstance whereby to show, there was no Malice or *Dole*, especially against the Defunct, since e-
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every Body may conceive, how easy it is for a Man that is drunk; pushing at one, even to stagger upon another, or not to have the Judgment and Presence of Mind to draw back, when that other suddenly throws himself in the Way of the Thrust.

What is laid down by the Pursuer in Opposition to all this in their Information, is so fully obviated, that 'tis quite needless to repeat the Argument; only whereas he says, ' That if Killing, notwithstanding of Provocation, had not been Capital, it could not have been a Doubt in the common Law, whether a Husband ought to suffer Death, who killed his Wife taken in the Act of Adultery? ' But we apprehend, that the direct contrary Consequence follows, that if high Provocation had not afforded a Defence, then indeed there could not have been a Doubt, the Husband must have died; because high Provocation was all he had to plead: But the Doubt was, whether a Provocation of that Kind, where there was no real corporal Injury to the Husband himself, was sufficient? And the Law determines that it was, and consequently establishes the Rule, that high and grievous Provocations ought to alleviate the Punishment.

The next Thing to be considered is, what was and is the Law of *Scotland* concerning this Matter; the Pursuer seems to be the first,

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that ever disputed, that according to it, there was a Distinction betwixt Slaughter and Murder: Sir George M^cKenzie is exprefs upon it; by our Law, fays he, Slaughter and Murder did of old differ, as *homicidium simplex* & *pre-meditatum* in the civil Law; and Murder only committed, as we call it, upon Forethought Felony, was only properly called Murder, and punished as fuch, for which he quotes the exprefs Statute, *Par. 3d. Cap. 51. K. James I.* appointing that Murder be capitally punished, but *Chaud melle*, or Slaughter committed upon Suddenty, fhall only be punished according to the old Laws, which exprefsly make the Distinction betwixt Forethought Felony and Slaughter of Suddenty: And though none of all thefe Laws particularly exprefs the Punifhment of Man flughter, as they could not well do, becaufe that was arbitrary according to Circumftances, yet as Sir George obferves, the Oppofition and Distinction is eftablifhed betwixt Slaughter by Forethought and *Chaud melle*, and the Punifhment of the one to be lefs than that of the other.

The Purfuer has endeavoured to fet up others of our ancient Laws in Oppofition to thefe obferved by Sir George M^cKenzie, fuch as the 3. Statute of King Robert the I. Which, with Submiffion, is nothing to the Purpofe. For 1^{ft}, It does not concern capital Crimes
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only, but any Crime touching Limb as well as Life. 2^{do}, Though the Word Slaughter is mentioned without adding by Forethought Felony, yet the same Thing is added in other Words, when it says, *touching Life or Limb*, to which alone the Act relates; that is Forethought Felony, because Slaughter by *Chaud melle* touched neither Life nor Limb. The Title of the Act is, *Men condemned to Death should not be redeemed*; but what is that to the Purpose in a Question, who should be condemned to Death, and who not?

The 43. Chap. of the Act of King Robert III. is as little to the Purpose, for as it speaks of Hairships, Burnings, Reif and Slaughter, 'tis very plain it means only wilful premeditate Slaughter, otherwise it would follow, that not only wilful Fire-raising, but burning of a House by Neglect, or *lata culpa*, would infer the Pain of Death. And the next Paragraph makes it further clear, appointing Sheriffs to take diligent Inquisition. " Giff any be common Destroyers of the Country, or hath destroyed the King's Leiges [with Hairship, Slaughter, &c. Can a Man be a common Destroyer by Slaughter, except where the Slaughter is supposed to be by forethought Felony? 'Tis certain he cannot, and therefore the Pursuer falls into a great Mistake in Law when he says, " That giff he be ken'd with

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“ the Aſſize, muſt relate to Man-ſlaughter, becauſe the Sheriff could not judge of Murder. It is directly otherwiſe, if he be attainted by the Aſſize as ſuch a Malefactor, that is, as a common Oppreſſor by Slaughter, &c. he is to be condemned to Death. This is an Exception from the Rule, that Murder was to be tried by the Juſtice Air. This Law appointed it to be tried in that Way, in Caſe the Perſon accuſed could find his Barras or Borgh to compare at next Juſtice Air, but if he could not, the Sheriff was immediately impowered to try: And by the By, this does not concern particular Facts, but concerns that general Accuſation of being a common Oppreſſor, like to the Caſe of a Sorner, or one habite and repute an *Egyptian*. Nor can the Lawiers for the Panel find any Word in the Statutes of *Alexander II.* which the Purſuer refers to, that does in the leaſt preſuppoſe that Man-ſlaughter was capital in them: The direct contrary appears that Man ſlayers were to be tryed, whether guilty of Murder or not, and if found not guilty, that they were to have the Benefit of the Girth.

The Purſuer's Obſervation by way of Answer to the 51. *Aſt Par. 3d. Ja. I.* is intirely nought; for if it extend the Difference between Forethought and *Chaud melle* to all Tranſgreſſions as well as Man-ſlaughter, then for certain it eſtabli-

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shes the Distinction in the Case of Man-slaughter; and so Sir George *McKenzie* likewise says in his Observations on this Act, as well as in his Criminals. And as to his further Observation, that *Chaud melle* is by our present Law punishable by Death, that still refers to the Act of Parliament *Charles II.* and must be examined with it.

The Pursuer further pled, That the Benefit of the Sanctuary might be competent, where Crimes were capital, which he founds upon the Statutes of *Alexander II.* But this is not worth disputing, for if the flying to the Sanctuary, join'd with Repentance, and so forth, rendered the Crime not capital, it is all the same Thing, that is, in Effect to render the Crime not capital only by another Form, but still the Substance remains, that according to the Law the Pain of Death was not to be inflicted. At the same Time, that Statutes concerning Reifs, whereby Repentance absolves from the Punishment, is somewhat peculiar, and does not at all contradict the other Laws, which make or suppose *Chaud melle* not to be capital. And the last Part of the Statute appointing, that if Man-slayers fly to the Kirk, the Law shall be kept and observed to them, establishes the Point, that if they were nor found Murderers by Forethought

they were to be returned to the Sanctuary and freed from Punishment.

The Pursuer says, 'That after the Reformation, when the *jur asyli* was in effect abolished, then the Distinction betwixt forethought ' Felony and *Chaud melle* ceased, and that it was ' never objected, that Malice or premeditate ' Design was requisite to make the Crime capital.' And for this, they take notice of two Cases, *Currie* against *Frazer* July 1641, and *Bruce* against *Marshall*, April 1644.

As to the 1st, which is *Frazer's*, there was not one Circumstance pled or proved, which could make the Slaughter *Chaud melle*, but on the contrary it appeared direct premeditate Murder, no real Provocation, but a Quarrel about a Staff; a Murder committed in Revenge, upon the Slaye's hearing the Person killed had murdered his Brother, which plainly implied a premeditate Design. What Argument this can afford, is submitted. This indeed may be remarked, that the Case gives some Notion of the Spirit of the Times; the Presbytery took Evidence whether the Murder was accidental or wilful, they found it to be wilful, and noways accidental; their having done so was taken as Evidence in Court, and even the Wife of the deceased was sworn as a Witness. In short, there is not one Circumstance in the whole Case, that could exclude the Premeditation

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tation or Forethought, but all quite on the contrary.

The other Case of *Marshal* in the 1644, is as little to the Purpose; he was libelled for wilful Murder, and he confessed it, without pleading any Defence, because he had none; he, in his Confession, adjected some Circumstances, which might have given some Colour, but indeed very little for a Defence; but he offered no Proof even of these Circumstances, and his own Declaration could be no Evidence of them, they were not intrinsic but extrinsic Qualities of the Declaration. He had given repeated Stabs with a Knife, where could be the Question that that was Murder?

As to the Act *Charles II.* it is humbly insisted for the Pannel, That it introduces no new Law against any Person accused of Slaughter, but ascertains somewhat in their Favours, viz. "That casual Homicide, Homicide in
" lawful Defence, and Homicide committed
" upon Thieves, &c. shall not be punished
by Death." And then further statutes, "That
" even in case of Homicide casual, it shall be
" leifom to the criminal Judge, with Advice
" of the Council, to fine him in his Means,
" &c. or to imprison him." This Law seems introduced to correct some Abuses that had been, whereby Homicides falling under
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some of these Descriptions, either had been punished with Death, or at least that it had been made a Doubt of, if they might not be so punished. What these Cases were, does not appear from the Records, but it seems such Cases, at least such Doubts, were. But then the Act does not determine what was meant by casual Homicide; and does by no Means say, That Nothing was to be reckoned casual Homicide, except that which was merely accidental: But on the contrary, it leaves casual Homicide to be explained, according to the Construction of former Laws, whether our own Laws, or the Laws of other Nations.

2do. It is plain from the Act, That by casual Homicide, something is understood quite different, at least beyond Slaughter merely accidental; for the Act is concerning the several Degrees of casual Homicide: And so even Homicide in Defence, and Homicide committed upon Thieves, &c. are brought under that general Description of casual Homicide; and these last Kinds are given, as Exemplifications of the general Description; which shews, that casual Homicide was intended to be opposed only to Slaughter *dolose*, committed either by premeditate Forethought, or Malice presumed, to be taken up from the Circumstances immediately preceeding the Act:

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Act: And therefore, however critical Exceptions may be taken to the Rule, yet materially there is no strong Objection lies to it; because when *Casual* is taken in the extensive Signification, as opposite to fraudulent and *dolose* Slaughter, all the Species mentioned in the Act do properly enough fall under it, and are Degrees of casual Homicide. And indeed it is worth observing, and makes in this Case for the Pannel, that the Rubrick cannot be said to have been indigested, or adjected by mere Inadvertancy, since the same Rubrick is made Use of in the Act 1649, and again repeated in the 1661, so may Years after.

And this Rubrick affords another plain Argument, That the Legislative did at least consider, that there might be Degrees of casual Homicide; and consequently they could not understand by that, only merely accidental Slaughter, strictly so called, since there can be no Degrees of that; it is but one, and does not admit of Degrees: And therefore this is sufficient to shew, that more was meant than the Pursuer inclined to admit; and if more was meant, that can allow of no other Construction, than to bring under these Words what the Lawyers call *Culpable Homicide*; so as that your Lordships and the Jury may judge from Circumstances, whether the Slaughter is
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to be reckoned as casual, or really malicious from Malice prepense.

The last Part of that Act of Parliament further enforces that Matter, which gives a Power, not only to fine for the Use of the nearest Relations, but even to imprison for casual Homicide. Now, how is it possible to believe, in Consistency with any Justice, that a Man might be imprisoned for a Fact intirely innocent, and noways either culpable or criminal? yet such Homicide merely accidental is: And therefore this shews to Demonstration, that the Legislative understood, that under the Description of casual Homicide, such a Fact might come as carried a *culpa* along with it, and was not absolutely accidental or innocent.

It is proper to take Notice of Sir George Mackenzie's Observations, upon the 51. Act James I. And in the *first* Place, If Sir George be supposed to go as far in his Opinion, as the Pursuer pleads, we must beg Leave to oppose the Law, and submit the Interpretation to your Lordships. 2^{do}. Sir George says nothing against the Slaughter's being casual in the present Case, where the Blow was intended at one, and another struck by Fatality. 3^{tio}. His Words do not go so far, as the Pursuer would stretch them; for in his Observation on the said Act, he only says in general,
 " That

“ That *Cbaude melle*, or *homicidium in rixa commissum*, is capital by our present Law.”

And so it is in many Cases ; for Instance, where the Killer is the Provoker, where he reiterates Strokes in such a Manner, as to show a Forethought and formed Design, although not premeditate for a long Interval of Time before : But Sir George does by no Means say, That *Cbaude melle*, or *homicidium in rixa commissum*, is in every Case capital.

His Observation upon the 90. Act is nowise against the Pannel ; he says indeed, “ That Murder tho’ committed without forethought Felony, is punishable with Death.” By which he must mean premeditate Malice ; and that is true, for no Doubt Malice, where it can be presumed from the Act it self, and where the contrary does not appear from Circumstances, is punishable by Death, with further Forethought : But then he subjoins an Exception, which leaves the Matter where it was, except, says he, it be casual, that is according to the Words of the Law : And so the Question remains, what is casual in the Sense of the Law ?

The Pursuer in his Information goes on next to mention a great many Cases that have been judged by the Court since the Act 1661. And the first Mention is, that of *William Douglass*, which appears in the Records, and
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is noticed by Sir George M^cKenzie; this Trial went on in general upon Art and Part, and there appears no particular pleadings to this Purpose on Record in that Case.

The next Case mentioned is that of *Nicolson* in the 1673, which can never make for the Pursuer, because there your Lordships sustained both the Libel and the Defence, though indeed the Defence was not proved: And therefore if the Pursuer say, That the Defence was upon *Chaud melle*, or culpable Homicide, the Case is with the Pannel, because your Lordships sustained the Defence. And altho' in reality the Crime was proved to be wilful Murder, and the Defence not proved; yet so far it is on the Pannel's Side, that the Advocate insisted, *Nicolson* was *versans in re illicita*, by carrying a Gun, which he acknowledged used to go off on half Bend; yet your Lordships sustained the Defence, that the Gun went off in a Struggle: It is true, the Man was said to be drunk, and there was not a previous Quarrel, but then there was no Provocation, no *justa causa iracundia*, and no *iracundia* at all; but the Gun was twice deliberately snap'd, and the third Time the Man was killed.

Another Case mentioned is, that of *Aird* in the 1693, which is something more to the Purpose, but does not yet Answer the Pursuers

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Pursuer's Intention. For the Lords did not there find, that every Homicide was capital, except what was merely accidental; they indeed sustained the Libel, and repelled the Defences, which were mainly founded upon Provocation by ill Words from a Woman, and her throwing a Chamber-pot at the Pannel's Face, who was a Soldier, which the Lords did not find sufficient to exculpate from the Libel, which bore reiterate Strokes to have been given the Woman in her own Door, (which by the By was Hamesucken) she thrown over the Stairs, and pursued by the then Pannel. The Case was very singular, first an Attack upon a Woman by a Soldier, which ought to have contemned Insults from the Female Sex, at least not returned them with any Blows: No Injury of that Kind from a Woman can justify Blows given, much less reiterated Blows, and deliberately trampling to Death, throwing her over her Stair, and still continuing to pursue her: There, the presumed Difference of Strength, and Difference of the Sex, made such an Attack a barbarous Murder: Just as an Invasion by a much stronger Man against a weaker, or by a Man against a Woman, although not with a mortal Weapon, would make a Blow with a mortal Weapon, given by such a Woman or weaker Person, come within the Description of

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of Self-defence: Which is a Case that Lawyers state, although the same Thing would not be Good, if they were of equal Strength, or that the Invasion was by the Woman, or Person of weaker Strength.

Another Case mentioned by the Pursuer is that of *George Cuming* in the 1695, and upon looking into the Case, it must be owned, that it seems a very narrow hard Case; but then the whole Burden of the Pursuer's Pleading turns upon this, That supposing there was a *rixa*, and that the Thing happened upon a sudden Quarrel, yet *Cuming* himself was the first Provoker, and the *auctor rixæ*; and therefore could not plead the Benefit even of Self-defence; which indeed brings the Case within what all Lawyers agree on; and had it not been for that Circumstance, it is impossible the Decision could have gone as it went: For in effect, the King's Advocate admitted the Defence, barring that Circumstance; but insisted upon that as what governed the Case.

The Pursuer also mentions the Case of *Hamilton* of *Green* anno 1716, which does not at all meet: For there a plain Murder was libelled, that the Pannel first made several Pushes with his Sword and Scabbard upon it; and not content with that, drew the Sword, and gave the Defunct the mortal Wound. And no Provocation was pled upon, on the
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Part of the Pannel, except what was verbal only. And the only real Injury, by striking with the Sword and Scabbard, was admitted to have been given by the Pannel. And though it was then pled, That the Defunct himself rushed upon the Sword, that was contrary to the Libel; and if the Fact had come out so, the Libel would not have been proved: And therefore that Case does not at all meet; for there were not sufficient Circumstances to exclude the Dole, or so much as to make a *homicidium culposum*.

Another Case he mentions is that of *Thomas Ross* and *Jeffery Roberts*, 20. July 1716; which makes against the Pursuer as it is set forth by himself: For then the Lords did sustain the Defence of Provocation by Words, receiving a Blow on the Face, being pull'd down to the Ground, and beat with a great Stick or Car-rung, relevant to restrict the Libel to an arbitrary Punishment. And though the Words, *To the imminent Danger of his Life*, are inserted as they were pled in the Defence; yet that was not a Fact, but a Consequence inferred from the being struck with a Stick. And if the *periculum vitæ* had been the Foundation on which the Interlocutor went, then it must have been unjust, because no Man alive ever doubted, that a Man in Self-defence, might lawfully kill, without being subject to an arbitrary

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bitrary Punishment, or any Punishment whatsoever: But the Case was, that your Lordships found the Provocation and real Injury reduced the Fact to a *Homicidium culposum*; you indeed sustained the Reply, that the Defunct was held by *Roberts* at the Time of receiving the Wound, because that excluded the Defence of the Pannel's being upon the Ground when he gave the Wound, and made the Fact amount to Murder, because it never was doubted, but if one stab another, especially with a Knife, which is stabbing in the most barbarous Sense, when that other is held, and so put out of the State of doing further Injury, that is Murder by the Law of all Nations.

The Case of *Lindsay* and *Brock* in 1717; is very far from putting the Case out of Doubt. The Case was, That the Defunct was enticed out of his House, and was attacked by two at the same Time; and when he and they were on the Ground, one of them, which came out to be *Lindsay*, stabbed him in the Throat with a Pen-knife. There your Lordships did not sustain the Crime as capital against them both, even upon the Art and Part, but only against the one who should appear to have given the Stab, and that came out to be *Lindsay*: But then indeed you found, not without Difference in Opinions, that nevertheless he had the Benefit of the Indemnity, upon
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this Foundation, that though the *homicidium* was *dolosum*, because of the Circumstances, yet it was not from Malice premeditate: And the Majority were of Opinion, that the Indemnity excluded nothing but premeditate Murder, and did not touch any Case done in *rixa*, notwithstanding the Person guilty might be the *auctor rixæ*. This does by no means determine any Question betwixt a *dolosum* and *culposum homicidium*, for that Fact was insisted to be *dolosum*, and indeed so found. 'Tis true, it proves that an Indemnity may reach even a *homicidium dolosum*, where the *Dole* arose immediately, and not *ex intervallo*.

The Case of *Matthews* the Soldier, the Pursuer admits was of the same Nature, and needs no other Answer; only that in that Case, there was no Circumstances sufficient to exclude the *Dole*, or make it only a culpable Homicide.

The Lawiers for the Pannel beg leave to take notice of several Decisions which establishes the Point pled for the Pannel. And the first is, that of Ensign *Hardy*, 6th June 1701. He was accused of Murder, by giving repeated Thrusts with a drawn Sword to one *Smith*, who at the Time had no Arms, whereof *Smith* instantly died, and that he afterwards boasted of his Crime and Cruelty; the Defence proponed and

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sustained, was, " That the Defunct was the
 " first Aggressor, and did take hold of the Pannel's Horse-bridle, and when he was holding the Horse by the Bridle, did give the Pannel a Stroke over the Face with a Rung, and wounded him to the Effusion of his Blood, and that the Defunct beat the Pannel from his Horse. " These were found relevant to restrict the Libel to an arbitrary Punishment : And then the Reply was sustained relevant to elide it, " That the Pannel beat the Defunct on the Face with a twisted Rode before he struck the Pannel. " Here again the Point is fixed, no casual Homicide, nor Homicide in Self-defence.

A Case yet stronger, is that of *Peter Macklean* the 1st March 1710, who was accused of the Murder of *James Ewing*, by shooting him dead with a fowling Piece, when *Ewing* had no Arms in his Hand. The Defence sustained to restrict the Libel to an arbitrary Punishment was, " That the Defunct quarreled the Pannel under the Name of Rascal, how he durst carry a fowling Piece ; and that if the Prince had his own, he durst not do so : And adding these Words, that her Majesty was but a Whore, and thereupon assaulted the Pannel for taking his Gun from him. " This is so plain that no Observation needs be made upon it.

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Another Case is that of *Batbgate*, 23^d January 1710. He was accused of murdering *Andrew Braidwood* by throwing him down to the Ground, and giving him several Strokes and Bruises, whereof he died. Your Lordships found the Libel only relevant to infer an arbitrary Punishment; yet the Fact was not intirely casual, nor pled to be so; and you sustained the Defence, that the throwing down libelled was only a wrestling out of no Malice; and that previous thereto the Defunct was *valetudinary*, and in the Habit of spitting Blood, relevant to elide the Libel in the whole.

The Case of *Govan*, 3^d March 1710, is not so plain as the others abovementioned, but yet it does assist in the Question. For there your Lordships sustained opprobrious Language and Invasion, by beating in a Scuffle, though without mortal Weapons, relevant to restrict the Punishment of killing with a Sword, even suppose the killing should be proved to have been within the Door of the House, when the last beating was only pretended to have been within the House; and so the beating must have been over before giving the Wound.

Another Case is that of *Carlops*, 8th January 1711; the Circumstances of which are so well known, that it is in vain to repeat them. It was neither accidental Homicide, nor Homicide in Defence; that the Beating

was *per plures commissum* in Conjunction, with any of the two following Defences, viz. that any Beating, committed by them, was in a *Tulzie* or *rixa*, in which they mixed themselves, to relieve a Youth in the Defunct's Grips, or in a Struggle with him. Or *separatim*, That they had Swords about them, and only made Use of Staves or Batons, relevant to restrict the Libel to an arbitrary Punishment.

Another Case, the 18. December 1713, is that of Serjeant *Davies*, who was accused of the Murder of Mr. *Robert Park*; where your Lordships found the Pannel his being alone, Time and Place libelled, and a Scuffle then happening betwixt the Defunct, with two or three more in Company, and the Pannel, and after a Beating with Staves betwixt the said Men and the Pannel, the said Pannel his retiring and calling for the Guard, and being mutilate in the Hand before he gave the said mortal Wound, relevant to restrict the Libel to an arbitrary Punishment.

Another late Case is that of *Jasper Reynold*, the 14. December 1724, where the Pannel being accused of killing *Robert Lamb*, by throwing him over the Stairs, without Cause or Provocation, whereby he was brained: Your Lordships sustained it only relevant to infer an arbitrary Punishment; yet

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sure it was not accidental, far less in Defence. All which Cases plainly establish the Point, that even since the Act of Parliament 1661, the constant Practice hath been to find culpable Homicides only relevant to infer an arbitrary Punishment; and that there are Homicides not punishable with Death, though neither merely accidental, nor in Self-defence.

There is also a Case which deserves to be noticed, as to that Point, of a third Party's being killed, when interposing betwixt other two in a Scuffle, which is the Case of *John Graham*, 1st. December 1712, where *Graham* was accused of murdering *David Cochran*; but your Lordships sustained the Defence, That while he was attacked by *Blyth*, with a drawn Durk, the Pannel was in his own Defence, with a drawn Bayonet; and that in the mean Time, the Defunct interposing as a Redder betwixt them, did casually receive the Wound libelled, relevant to restrict the Libel to an arbitrary Punishment.

As to the Laws of other Countries, particularly the Law of *England*, although we apprehend the Law there does not differ substantially from our Law in this Particular; except it be in these, 1mo. That Manslaughter is in effect not punishable at all in *England*, otherwise than by a Kind of elusory Punishment.

ment. 2^{do}. That in no Case *dolus* is presumed only from the giving the Wound, except upon the particular Statute of stabbing. Whereas indeed it is in several Cases otherwise with us; culpable Homicide is punishable arbitrarily; and no Doubt in many Cases, where contrary Circumstances do not appear, the giving a Wound presumes Dole; and even by the Statute of Stabbing, the Killer hath the Benefit of his Clergy, if the Person killed give the first Blow or real Provocation, and that although the Provocation did not immediately precede the Act of Killing, if it happened at any Time of the Quarrel.

We must likewise refer to several Places set down by *Hawkins*, in his Pleas of the Crown, which fully agree with what we now plead. And particularly of what he says, Page 84, " If a third Person accidentally happened to be killed, by one engaged in a Combat with another, upon a sudden Quarrel, it seems that he who kills him, is guilty of Manslaughter only. And it would seem, that there is even a Difference made betwixt killing a Person, that endeavours to interpose, if he tell that he comes for that Purpose, and Killing one who accidentally is interposed, betwixt the two contending Parties. The Killing him who interposes to separate, if he give Notice what he is doing,

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“ doing, is reckoned worse than the Killing
“ the other.” And this Observation shews,
That the present Case is stronger than the a-
bove cited of *Graham*, where your Lordships
restricted it to an arbitrary Punishment.

The Pursuer further pretended, “ That as
“ he had libelled Malice, he would prove it
“ from other antecedent Facts that happened
“ sometime before, whereby it would appear,
“ that there was Enmity betwixt the Defunct
“ and the Pannel.”

It was answered, That no such Facts being
libelled, nor condescended upon, either in
the Debate or Information, they can in no
Means enter into the Proof; otherwise the
highest Injustice would be done to the Pannel
in this, and every such Case; for if the pre-
tended Facts, inferring Malice had been libel-
led, then it would have been competent to
the Pannel, to have elided the same by a pro-
per Proof, to shew that they inferred no Ma-
lice on his Part; he might have proved Dis-
simulation or Reconciliation, and would have
been proponed for that Purpose. But where
such Facts are concealed, and may have hap-
pened at an unknown Distance of Time, it is
impossible the Pannel can be prepared with
proper Evidences. And though it is sufficient
in an Indictment, to libel Malice in general,
in order to make a Relevancy; yet then it is

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always underſtood, that the Purſuer intends no more, than the preſumed Malice ariſing from the Faſt libelled.

In the *next* Place, The Pannel offers to exclude all Pretence of former Enmity, by proving, that for ſome Time before, they had met from Time to Time occaſionally, without any Marks of Enmity, but all the ſeeming Requiſites of Friendſhip and Civility intervening.

Upon the Whole, it is plain from what is above ſaid, That culpable Homicide, both by our Law and Practice, is puniſhable only arbitrarily, and comes under the general Deſcription of caſual Homicide, in the Act 1661. No Caſe can be more favourable than this, where Death happened to a Perſon, nowiſe intended to be hurt.

And therefore it is hoped, your Lordſhips will ſuſtain the Defence pled for the Pannel relevant to reſtriſt the Libel to an arbitrary Punishment.

J. G.

The

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The Day to which the Court was adjourn-
ed being come, the Lords being present and
set on the Bench, the Pannel being sent for
out of Prison, attended by a Guard, the Clerk
inserts the *Sederunt* of the Judges present.

*Curia justiciarü S. D. N. Regis, tenta
in prætorio burgi de Edinburgb —
die mensis — anno domini —
per honorabiles viros — justiciari-
um clericum dominos —
— & — commissionarios justiciarü
dict. S. D. N. regis.*

Curia legitime affirmata.

Intran.

*C. D. Prisoner in the Tolbooth of Edinburgb,
indicted and accused ut in die præcedenti.*

The Cause being called, and the Criminal re-
entred the Pannal, the Preses desires the Clerk
to read the Libel or Indictment; which be-
ing done, he reads the Pursuer's and Pannel's In-
formations

formations off the Book ; and after all is read, the Preses resumes the Heads of the Pursuer's Information and the Pannel's Answer, to the Lords, and desires their Opinion: According-ly they give the same ; and if they are all unanimous, or a Plurality, then the Interlocutor on the Relevancy is dictate by the Preses to the Clerk, and wrote in the Book.

Formerly the Interlocutors pronounced by the Judges were special, finding such and such Points relevant to infer the Pain of Death, and such and such Points relevant to infer an arbitrary Punishment.

But now the Interlocutors are ordinarily in general, finding the Libel relevant to infer the Pains of Law. Whereof the Tenor follows.

The Lords Justice General, Justice Clerk and Commissioners of Justiciary, having considered the Libel pursued at the Instance of *D. F.* his Majesty's Advocate, for his Highness Interest, against *C. D.* Pannel, with the foregoing Debate thereupon ; They find, That the Pannel, at the Time and Place libelled, having, by Premeditation and forethought Felony, with a Poynard, or other mortal Weapon, wounded the deceast *G. B.* of which Wound he soon thereafter died, or that the Pannel was Art and Part thereof, relevant

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levant to infer the Pains of Law. But allowed the Pannel to prove all Facts and Circumstances he can, for taking off the aggravating Circumstances of Forethought and Premeditation. And also fand, That the said Pannel, Time and Place foresaid, having with a Poynard, or other mortal Weapon, wounded the said G. B. of which Wound he soon died, or that the Pannel was Art and Part thereof, *separatim* relevant to infer the Pains of Law. And repel the hail Defencees proponed for the Pannel, and remit him and the Indictment, as found relevant, to the Knowledge of an Assize.

C. A. I. P. D.

But if any Defence shall be sustained for the Pannel, it is insert in the Interlocutor, such as, the Pannel was *alibi* the Time of committing the Fact; the Lords insert in the Interlocutor thus. And sustain the Defence proponed for the Pannel of his being *alibi* the Time libelled relevant to elide the Libel, and repel the hail other Defences proponed for the Pannel, and remit the Libel and Defence as found relevant to the Knowledge of an Assize. And the Pannel is allowed to prove the same by way of Exculpation, and a competent Time is craved for adducing of his Proof, in case the Witnesses be at any considerable Distance, which the Judges generally allow; in case the Pannel

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Pannel has not run Precepts, they are restricted to no Time; but if he has, then any Delay in his Prosecution, being at his own Request, stops the running out of the Sixty, Thirty or Forty Days, and upon this the Proof against the Pannel is delayed till the Day of Compearance of his Witnesses in the Exculpation, to which Time the Diet is likewise prorogate.

The said Day being come, the Clerk inserts the *Sederunt* of the Judges present, and writes in the Book thus

*Curia justiciarum S. D. N. Regis, tenta in
prætorio burgi de Edinburg — die mensis
— anno domini — per honorabiles viros
— justiciarium clericum dominos —
— — — — — & — commissarios
justiciarum dict. S. D. N. regis.*

Curia legitime affirmata.

Intran.

C. D. Indicted and accused ut in die præcedenti.

The Pannel or his Doer, having reported his Exculpation to the Clerk, with the Executions against the Witnesses cited, and Execution

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cution of the List of them delivered to the Advocate or private Party, and if the Witnesses are not come up, the Pannel or his Lawi-er may crave a second Diligence, but if they are come and attending, and the Pursuer ready to insist, then the Clerk calls the List of the Witnesses both for the Pursuer and Pannel, and if all are present, then they are put up in a Room where no Body is allowed to speak to them till they are examined.

But if any are absent, the Pursuer may crave them to be unlauded, which is accordingly granted, and which the Clerk pronounces to the Macer thus.

The Court shews for Law, that——and——are in an Unlaw and Ammerciament of One Hundred Merks for not compearing to bear Witness in this Trial, as they who were lawfully cited for that Effect, *vide Ja. VI. Par. 13th. Cap. 166.*

A. C. I. P. D.

Thereafter the Preses causes call the List of Assizers to answer to their Names, which being called and they appearing, the Preses marks out Fifteen out of the Forty five Assizers that are to pass upon the Pannel's Assize, and the Clerk calls them Five by Five, and turning about to the Pannel, the Preses asks the Pannel, If he has
any

any Objection, why these Five may not pass upon his Assize? If he has none, then the Preses swears them, as mentioned in *Page 44*; And if any of the Forty five are absent before choosing, they are unlaured, as in *Page 45*.

If the Pannel be a landed Gentleman, and no competent Number of landed Men there present to pass upon his Assize, the Pannel can object there-against, and have the Diet deserted, whether the Crime be Capital and Precepts run or not; but if he can rely on his Innocence, and is willing the Trial go on, then he passes from his Privilege, and signs his Consent in the Book.

The Clerk placing down the Assizers Names as mentioned in *page 45*. the Assize all lawfully sworn and no Objection of the Law in the contrary, the Pursuer for Probation, adduces the Witnesses after deponing *viz.* ——— and ———

The Jury being sworn, and one of the Witnesses called in before the Court, the Judges cannot go off the Bench, at least a *Quorum* must remain, till all the Witnesses be examined, or so many as the Pursuer has a mind to make Use of. And in case two and two Witnesses agree upon the different Points of the Libel, whereby the Probation becomes plenary, and the Advocate is willing to pass from the rest, then the Lords dis-

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dismiss them; and in case there be an Exculpation in the Field, and wherein any of the Witnesses are cited by the Pannel for proving his Allegations, in that case they must be examined.

And in case of no plenary Probation by two and two Witnesses, but the Pursuer inclining to have the whole Witnesses examined, then they are called in One by One, and the Witness appearing at the Bar before the Pannel, the Preses who begins to examine the first Witness, and so for Two or Three, (and the rest of the Lords examine *per vices* till all are examined) desires the Witness to turn about to the Pannel, and asks the Pannel if he has any Objection why he may not be received as Witness against him; if he has any Objection, he propones them or his Advocate for him, and if the Objection is sustained relevant and proven, the Witness is rejected or taken *cum nota*.

But if any other Witness against whom no Objection can be made, be adduced against the Pannel, then the Lord Examiner swears the Witness after this Manner; the Witness holding up his Right-hand, repeats the Words after his Lordship thus. *By GOD himself, and as he shall answer to GOD at the Great Day, he shall declare the Truth and nothing but the Truth, in so far as he knows, or shall be spiered*

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spiered at him. After the Witness is sworn, the Preses purges him of partial Council, That is to say, if he bears any ill Will, Malice or Prejudice against the Pannel, or has got any good Deed, or Promise of good Deed or Reward to depone or swear against him; or if he has been directed, informed or told what he was to depone, or has directed or advised the Prosecution; any of these will set aside the Witness; but if the Witness depone he has no ill Will, &c. then the Lord examines him upon his Knowledge as to the Points libelled against the Pannel. And the Clerk for Preamble writs in the Book thus.

G. H. aged — Years or thereby, married, solemnly sworn, purged of Malice, Prejudice, and partial Council, examined upon the Points of the Libel, interrogate, depones. Here the Witness's Deposition is insert, and closes with these Words, Causa scientiæ patet. And this is the Truth as he shall answer to GOD.

G. H.

A C.

This Deposition is signed by the Witness and Lord Examiner; and in Case the Witness cannot write, the Clerk adds, And depones he cannot write, and the Lord Examiner signs.

After emitting of the Deposition, the same is read over by the Clerk to the Witness, to

see

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see if it be what he has deponed, and so to the rest, till all be examined, or at least so many as the Pursuer has a mind to make use of. Any of the Fifteen Assizers has the Privilege to propound any Question to the Lords to be interrogate at the Witness, in Relation to the Facts contained in the Indictment. And the Witnesses Expences are paid by the publick or private Pursuer, the Horse-men at Sixteen-pence *per* Day, and the Foot-men at Eight pence *per* Day. If the Pannel is allowed an Exculpation, and Witnesses summoned and appearing (whether they be examined or not) he pays as formerly mentioned.

The Witnesses being all examined, and the Pursuer declining to lead any more Proof, his Majesty's Advocate makes a Speech to the Jury of what is proven, anent the Pregnancy of the Proof against the Pannel; and after he is done, the Advocate for the Pannel makes an Answer thereto in his Favours, as to the Lameness of the Proof against him; and after they are ended, the Preses ordains the Assize to inclose, and return their Verdict the next Day at Twelve a Clock. Before inclosing of the Assize, the Clerk leaves a *Formula* with them for their Direction, and whatever Necessaries are wanted are got to them, *Page 46.*

Thereafter the Macer incloses them in, by locking the Door on them; so that none of

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the

194 *The Form of Proceſs*

the Fifteen Aſſizers muſt look over a Window, or ſpeak to any Perſon before they have agreed to their Verdict; which if they do, and can be proven, the Pannel will plead to be aſſoiled.

The Aſſize being incloſed, and having choſen a Chancellor and Clerk of their own Number, and unanimoſly or by Plurality of Voices agreed, that the Libel or Indictment is proven or not proven, or the Pannel guilty or not guilty; or if they make their Verdict ſpecial, as to what Points in the Libel are proven or not, the Chancellor of the Aſſize, marking what Way every individual Perſon, who is upon the Aſſize, does vote, whether condemning or aſſoiling, on the ſame Paper where the Verdict is written, which after pronouncing of the Verdict, is to be cloſed and ſealed with the Seal of the Court, or of the Chancellor of the Aſſize, and never to be opened, but by Order of the Judges; with Certification, if the Clerk, who has the keeping of the ſaid Verdict, do make open the ſame without Warrant, he is to be deprived of his Office, and otherways puniſhed as the Judges ſhall think fit.

The Court again meeting at the Time to which it was adjourned, the Clerk inserts the *Sederunt* of the Judges preſent; the Pannel being

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before the Justiciary Court. 195

ing sent for and entring the Pannal, the Clerk writes in the Book.

Intran.

C. D. Indicted and accused *ut in die precedenti.*

Thereafter the Clerk calls the Fifteen Assizers off the Book, and all being present, (if any are absent they are unlaured) as in Page 48.

The Preses calls for the Chancellor of the Assize to give in their Verdict, who delivers it accordingly. Thereafter the Lords open the Verdict and read it, and after reading, give it to the Clerk to record in the Book, and after recording, the Clerk reads the Verdict to the Pannel, and thereafter seals it up again with the Chancellor or Clerk's Seal, never to be opened without a *Quorum* of the Lords present.

If the Verdict be finding the Libel not proven, or the Pannel not guilty, then the Lords assoilzie the Pannel, and dismiss him from the Bar, which the Clerk pronounces to the Macer thus.

The Lord Justice Clerk, and Commissioners of Justiciary, in respect of the foregoing Verdict of Assize, assoilzie the said *C. D.* Pannel.

nel, and dismiss him from the Bar, whereupon he takes Instruments.

A. C. I. P. D.

But if it be a special Verdict, finding such and such Points proven, and all those not amounting to a full Proof of the Libel, then the Lords reason among themselves, anent the Pannel's being assolizied, or what arbitrary Punishment shall be inflicted upon him.

Of old, if there was no Alternative in the Interlocutor on the Relevancy against the Pannel, finding such and such Points relevant to infer an arbitrary Punishment, the Pannel was assolizied. But now the Lords Interlocutors are in general, finding the Libel relevant to infer the Pains of Law; so that what ever Way the Verdict be, if any particular Points of the Libel be found thereby proven, the Lords reserve Power to themselves, to order the Punishment accordingly, and the Pannel is seldom assolizied but some Punishment is inflicted, and the Jury is uncertain, whether the Punishment will be Capital or not, whereby they ought to be the more cautious in giving their Verdict, and to have a special Regard to the Quality of the Proof and Witnesses adduced.

And if the Verdict is in general, finding the Libel proven, or the Pannel guilty, then

the

before the Justiciary Court. 197

the Lords pronounce Sentence, as they think, agreeable to Law. If the Sentence is capital, then the Lords give their Opinion, That the Pannel should, again a certain Day, be taken to the *Grass Market* of *Edinburgh*, or any other Place, and there to be hanged by the Neck on a Gibbet, until he be dead, and all his moveable Goods and Gear to be Escheat, for his Majesty's Use; or, as is said before, with Relation to notorious Criminals, *Page 54.*

Thereafter the Lords order the Clerk, to write the Sentence in the Book. The Sentence being written and signed by them, and read by the Clerk to the Dempster, who pronounces the same to the Pannel, as in *Page 54.*

After the Sentence is pronounced by the Dempster to the Pannel, the Pannel is ordered back to Prison; and a Copy of the Sentence, signed by the Lords, is made out, and given to the Magistrates of *Edinburgh*, ordering them to see the Sentence put in Execution, as they will be answerable on their highest Peril, *Page 56.*

S E C T. VIII.

Anent the Way and Manner of raising and executing Criminal Letters against any Person, for whatsoever Crime, with the Forms thereof.

WHEN Information is given to any of the Lords of Justiciary, by any private Person or Persons, against several Persons, as guilty, Actors, Art and Part of a Blood-wet, Battery, or any other Crime that is bailable, Warrant is thereupon granted, and one or two being apprehended, and imprisoned for the same, and the rest abscond; these who are imprisoned (or in the Macer or Messenger's Custody) after getting a Double of the Warrant of their Commitment, signed by the Keeper, if in Prison, or by the Messenger, if in Custody, may apply by Petition to any of the Lords of Justiciary, but first to the Lord who granted the Warrant, the Tenor whereof follows.

Unto

before the Justiciary Court. 199

Unto the Right Honourable the Lord Justice Clerk,

The PETITION of *A. C. C. D. D. E. E. F. and F. G.* Prisoners in the Tolbooth of _____

Humbly sheweth,

THAT where, we are imprisoned, by a Warrant issued out by your Lordship, upon an Information given in by *A. B.* against us, for our alledged beating and bruising of him, to the Effusion of his Blood, in Manner mentioned in the said Warrant; as the attested Double thereof, under the Hand of the Keeper of the Prison, herewith produced, doth testifie. And we being willing to find Bail, to answer for the Crime alledged against us, conform to Law;

May it therefore please your Lordship to cognosce whether the Crime, for which we are imprisoned, beailable or not: And if bailable, to modifie the Sum, for which your Petitioners are to find Bail, and upon finding the same, to ordain us to be set at Liberty.

According to Justice, &c.

The Prisoners sign this Petition themselves, or a Lawyer for them.

The Deliverance wrote by the Clerk on this Petition, is as follows.

The Lord Justice Clerk having considered this Petition, with the Double of the Warrant of Commitment, under the Hand of the Keeper of the Prison, therewith produced, finds the Crime, for which the Petitioners are charged, bailable; and ordains them to find Caution, acted in the Books of Adjournal, to answer to any Libel or Complaint that shall be exhibited against them, within the Space of six Months, next after the Date of the Bond of Caution, to be given by them for that Effect, under the Penalty of ——— And upon finding the said Caution, ordains them to be set at Liberty.

A. C.

Follows the Bond of Cautionry, for Compearance at any Time within the Space of six Months, taken by the Clerks, in the Terms of the above Interlocutor.

We *A. C. C. D. D. E. E. F.* and *F. G.* as Principals, and *H. J.* as Cautioner, bind and oblige

before the Justiciary Court. 201

oblige us conjunctly and severally, our Heirs, Executors and Successors, acted in the Books of Adjournal, That we the said *A. C. C. D. D. E. E. F.* and *F. G.* shall compear before the Lords Justice General, Justice Clerk and Commissioners of Justiciary, and answer to any Libel or Complaint, that shall be exhibited against us, as alledged accessory to, and being guilty, Actors, Art and Part of a Boodwet or Battery committed upon *A. B.* And that at any Time and Place we shall be lawfully cited to for that Effect, within the Space of six Months from the Date hereof, under the Penalty of ——— And that in Obedience, and conform to an Interlocutor pronounced by the Lord Justice Clerk, upon a Petition presented by us of this Date to his Lordship thereanent. And we the said *A. C. C. D. D. E. E. F.* and *F. G.* bind and oblige us and our forelaids, to warrant, free, relieve and skaithless keep our said Cautioner of his Cautionry above written, and of all Cost, Skaith, Damage and Expences he, or his foresaids, may happen to sustain therethrough.

A. C.

C. D.

D. E.

E. F.

F. G.

H. J.

If

If the private Party has a Mind to prosecute the Complaint, then a Memorandum for drawing a Bill of criminal Letters, is made out by his Majesty's Advocate or his Deputes, or private Lawyer, at the Instance of the private Party, with Concourse of his Majesty's Advocate. The Bill being made out, in the Terms of the Memorandum, his Majesty's Advocate grants Concurrence thereto, either by signing it himself, or by one appointed by him; and writes on the Bill thus. "*Edinburgh* " the — Day of — Concurrence " granted for his Majesty's Advocate, and " signs thereto." This Concurrence must be had before the Bill be presented to be past, and pays of Dues eleven Merks. The Lawyer who draws the Bill, signs thereto: But if his Majesty's Advocate draw the Bill and sign it, his signing is sufficient for Concurrence. After Concurrence is granted, the Clerk writes on the Back of the Bill thus. "*Apud Edinburgum* — die mensis — anno Domini " — *Fiat ut petitur* to the — Day of " — next to come." The Clerk signs on the Back of the Bill, and says, *Soverty is found.* A List of Forty Five Assizers are made out, and presented with the Bill by the Clerk to the Lords, which Bill is signed by one Lord, and the List of Assize is signed by the whole or a Quorum. Before

before the Justiciary Court. 203

Before expeding of the Letters, the Pursuer must find Caution, for reporting the Letters duly execute, against the Day of Appearance; and a Bond of Caution is written in a Book, kept by the Clerk for that Effect, whereof the Tenor follows.

Edinburgh the — Day of — 17 — Years.
The said Day compeared *A. B.* as Principal, and *J. G.* as Cautioner, and became enacted, bound and obliged, conjunctly and severally their Heirs, Executors and Successors, acted in the Books of Adjournal, that the said *A. B.* shall report the Criminal Letters duly execute and indorsed, and insist in the pursuit thereof, purchased at his Instance and at the Instance of *D. F.* his Majesty's Advocate for his Highness Interest, to take Soveryty of *A. C. C. D. D. E. E. F.* and *F. G.* That they shall compear before the Lords Justice General, Justice Clerk and Commissioners of Justiciary, within the Tolbooth or Criminal Court-house of *Edinburgh*, the — Day of — next to come, in the Hour of Cause, there to underly the Law, for the Crime of Blood-wet or Battery committed by them in Manner mentioned in the criminal Letters raised against them thereanent; and that under the Pénalty contained in the Acts of Parliament; and the said *A. B.* became enacted,
bound

bound and obliged his Heirs, Executors and Successors, for his Cautioners Relief in the Premisses.

A. B.

J. G.

Thereafter the criminal Letters are expedite, the Tenor whereof follows.

GEORGE by the Grace of GOD, King of Great Britain, France and Ireland Defender of the Faith, To our Lovits

Macers, Messengers at Arms, our Sheriffs in that Part conjunctly and severally specially constitute, Greeting. FORASMUCH AS, it is humbly meaned and complained to us by our Lovit, *A. B.* of — with Concourse of *D. F.* our Advocate for our Interest, upon *A. C. C. D. D. E. E. F.* and *F. G.* That where, by the Laws of this and all other well governed Realms, the violent invading and attacking any of our Leiges with Stones, Staves and other such Weapons, and the beating, bruising and wounding of them to the Effusion of their Blood, and most imminent Danger of their Lives, without any Cause or Provocation, are Crimes of a high Nature and severely punishable, and are the more aggravated when done and committed under

before the Justiciary Court. 205

under Cloud of Night, on the high Street of any Town or Village, being a Place of great Commerce, and to which the Leiges resort in great Numbers, and therefore is the more immediately under the Protection of the Law, and ought to be render'd the more secure ; And is still the more odious when committed by a Number of Persons, assembled together against a single Man, and when persisted in, notwithstanding of his crying for Mercy, when helpless and alone amongst them. **YET TRUE IT IS** and of Verity, That the said Persons above complained upon, shaking off all Fear of GOD and Regard to our Laws, are all and each of them, or one or other of them, guilty, Actors, Art and Part of the fore-said Crimes. **IN SO FAR AS**, upon the — Day of — 17 — Years, about the Hour of — at Night, or one or other of the Days of the said Month, the said *A. B.* walking along the Street of the Town of — with a Gentleman in Company with him and his Servant, and another carrying a Lantern before him in a peaceable Manner, he was assaulted and invaded, without any just Provocation, by the said Persons above complained upon, or one or other of them, with large Staves, whereby having beat off the other Persons who were along with the said *A. B.* broke the Lantern and put out the Light
that

that was carried before him, they barbarously beat, bruised and wounded him with Stones, Staves or other Weapons, and persisted thus cruelly to use him, notwithstanding of his crying aloud for Mercy, while in the mean time they were uttering execrable Oaths, and crying, *No Mercy, you Dog, you shall die like a Dog*, or Words to that Purpose: And particularly they wounded him, in the Fore-head, with a Stone or other Weapon, so as a Part of his Scull was broken, to the great Effusion of his Blood, and most imminent Danger of his Life, and left him wallowing in his Blood and in a miserable Condition, unable to assist himself, until by the Charity of others, moved with Compassion, he was carried to a neighbouring House, where his Wounds were panced, which appeared to the most skilful Persons so dangerous, that for some Days even his Life was despaired of. At least the Persons above complained upon, having met with the said *A. B.* on the Street of——after some high Words had past amongst them, went on with their Lantern, and having turned Back, Orders were immediately given to the Servant who carried the Lantern before them, to retire and go off, and then a great Vollee of Stones were thrown towards the Place where the said Complainer was standing on the Street as aforesaid, and there-

before the Justiciary Court. 207

thereafter a great many unmerciful Strokes were heard or seen to be given to him; and immediately thereafter the said *A. B.* was found wounded, bleeding, and in the miserable Condition above set forth, and the Persons above complained upon were seen retiring from the above Place, laughing and wishing the right Person might have been beat; and the next Day they fled and absconded, taking thereby guilt upon them. At least the Persons above complained upon, or one or other of them, were Art and Part in the wounding, beating and bruising aforesaid. Which Facts, or Part thereof, or their being Art and Part of the foresaid Crimes, being found proven by the Verdict of an Assize, before our Lords Justice General, Justice Clerk, and Commissioners of Justiciary, they and each of them ought to be punished with the Pains of Law, and decerned to pay the Sum of——in Name of Damages and Expences to the said Complainers, to the Example and Terror of others to commit the like in Time coming. OUR WILL IS HEREOFRE, and we charge you strictly and command, that in continent thir our Letters seen ye pass, and in our Name and Authority command and charge the said *A. C.* and hail other Persons above complained upon, to compear, and to come
and

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and find sufficient Caution, and Soverty acted in the Books of *Adjournal*, That they shall compear before our Lords Justice General, Justice Clerk and Commissioners of Justiciary, within the Tolbooth, or Criminal Court-House of *Edinburgh*, the — Day of — next to come, in the Hour of Cause, there to underly the Law for the Crimes abovementioned, and that under the Pains contained in the Acts of Parliament; And that ye charge them personally, if they can be apprehended, and failzieing thereof, at their Dwelling-houses, and by open Proclamation at the Market Cross of the Head Burgh of the Shire, Stewarty, Regality, or other Jurisdiction where they dwell, to come and find the said Caution and Soverty, acted in manner foresaid, within — Days next after they be charged by you thereto, under the Pain of Rebellion and putting of them to our Horn. Whilk — Days being bygone, and the said Soverty not found, nor no Intimation made by them to you of the finding thereof, That in continent thereafter ye denounce them our Rebels, and put them to our Horn, escheat and in bring all their moveable Goods and Gear to our Use, for their Contempt and Disobedience, and that ye within Fifteen Days thereafter cause registrate thir our Letters with the Executions thereof in our Books of *Adjournal*,

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before the Justiciary Court. 209

Adjournal, conform to the Act of Parliament made thereanent; and if they come and find the said Caution (Intimation always being made by them to you of the finding thereof) that ye summon an Assize hereto, not exceeding the Number of forty five Persons, together with such Witnesses who best know the Verity of the Premises, whose Names shall be given you in List subscribed by the said Complainers, or either of them, to compare before our said Lords, Day and Place foresaid, the said Persons of Inquest to pass upon their Assize, and the said Witnesses to bear leil and soothfast Witnessing, in so far as they know or shall be spiered at them, ilk Person under the Pain of 100 Merks. According to Justice, as ye will answer to us thereupon. The which to do we commit to you, conjunctly and severally our full Power, by thir our Letters, delivering them by you duly execute and indorsed again to the Bearer. Given under our Signet at *Edinburgh* the — Day of — and of our Reign the — Year, 17 —

Ex deliberatione Dominorum Commissionariorum Justiciarum.

J. D. Clerk.

If any Writs are libelled on, Doubles are either made out and given to the Criminals,
O or

or the Writs are libelled on, as lying in the Clerks Hands, that they may see the same.

These Letters are execute upon six Days Charge, to find Caution, if on this Side of the Water of *Tay*, if on the other Side of *Tay* they are execute on fifteen Days Charge, if on the other Side of *Pentland-Firth*, they are execute on Forty Days Charge, if the Persons or any of them are out of the Kingdom, then Bill and Letters must contain a Warrant for citing them at the Market Cross of *Edinburgh*, Pier and Shore of *Leith* on Sixty Days Charge.

After the Letters are taken out, the Pursuer imployes a Macer or Messenger to execute the same against the Criminals, which is done after this Manner, *viz.* The Messenger doubles the Letters *verbatim*, and thereafter says, Follows the List of Assizers Names and Designations that are to pass upon your Assize, (here to insert the Assizers Names and Designations, and the Lords Names signing the Assize.) And thereafter says, Follows the List of the Witnesses Names and Designations that are to be deduced against you, (here to insert the Witnesses Names and Designations, with the Persons Name signing the List,) and the Macer or Messenger writes a short Copy by way of Charge to the Criminal, after this or the like Manner, *viz.*

before the Justiciary Court. 211

I *J. G. Macer* to the Justiciary Court, by vertue of criminal Letters raised at the Instance of *A. B.* with Concourse of *D. F.* his Majesty's Advocate for his Highness Interest, against *A. C.* and others, in his Majesty's Name and Authority command and charge you the said *A. C.* to compear, and to come and find sufficient Caution and Soverty, acted in the Books of Adjournal, that you shall compear before the Lords Justice General, Justice Clerk and Commissioners of Justiciary, within the Tolbooth or criminal Court-house of *Edinburgh*, the — Day of — next to come, in the Hour of Cause, there to underly the Law for the Crimes mentioned in the said criminal Letters, and that under the Pains contained in the Acts of Parliament. And that you come and find the said Caution and Soverty, acted in Manner foresaid, within — Days next after this my Charge, under the Pain of Rebellion and putting of you to the Horn, with Certification, conform to the principal Letters, which are dated and signet at *Edinburgh*, the — Day of — of the which principal criminal Letters, with a List of the Assizers Names and Designations that are to pass upon your Assize, and a List of the Witnesses Names and Designations that are to be deduced against you, I herewith give you an just and exact Copy, upon this —

Day of — 17 — Years, before theſe Wit-
neſſes — — — and — — —

*Ex deliberatione Dominorum Commiſſi-
onariorum Juſticiarum.*

J. G. Macer.

The Executor muſt obſerve, That before he ſerve the Criminals with a Copy of the Letters, there muſt be fifteen free Days allowed him, from the Day of the Citation to the Day of Compearance: Thoſe of the Criminals whom the Executor cannot get perſonally, he leaves a full Double of the Letters, with Liſts of the Aſſizers and Witneſſes Names and Designations, and a ſhort Copy by Way of Charge ſubſcribed by him, at their reſpective dwelling Places; and immediately thereafter goes to the Market Croſs of the Head Burgh of the Shire, Stewartry, Regality or other Jurisdiction, within which the Criminals dwell or reſide; and there leaves another full Double, with a ſhort Copy by Way of Charge ſubſcribed by him, at and upon the ſaid Market Croſs, becauſe of their not being perſonally apprehended.

This being done, and the Letters duly execute, Executions are made out accordingly: Whereof the Tenor follows, *viz.*

The Execution againſt ſome of the Criminals perſonally apprehended.

Upon

before the Justiciary Court. 213

Upon the — Day of — 17 —
Years, I J. G. Macer to the Justiciary Court,
past at Command of criminal Letters, raised
at the Instance of *A. B.* with Concourse of *D.*
F. his Majesty's Advocate, for his Highness In-
terest; and by Virtue thereof, in his Majesty's
Name and Authority, commanded and charg-
ed *A. C.* and *C. D.* to compear and come and
find sufficient Caution and Soverty, acted in the
Books of Adjournal, that they shall compear be-
fore the Lords Justice General, Justice Clerk
and Commissioners of Justiciary, within the
Tolbooth or Criminal Court House of *Edin-*
burgh, the — Day of — next to come, in
the Hour of Cause, there to underly the Law
for the Crimes within mentioned; and that
within the Space, under the Pains, and made
Certification, as is within exprest. This I
did, after the Form and Tenor of the said
criminal Letters in all Points, which are
dated and signet at *Edinburgh*, the — Day
of — by delivering to the said *A. C.*
and *C. D.* and each of them, a full Double of
the said Letters, with a List of the Assizers
Names and Designations that are to pass upon
their Assize, and a List of the Witnesses
Names and Designations that are to be ad-
duced against them, with a short Copy by
Way of Charge, subjoined thereto, subscribed
by me, both personally apprehended, upon the

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said — Day of — and Year foresaid :
Which Copies did bear the Day and Date
hereof, Witnesses Names and Designations
therein insert, present thereat, and hereto sub-
scribing, viz. — and —. And for the more
Verification hereof, I and the said Witnesses
have subscribed the samen.

J. G. Macer.

*Follows the Form of the Execution against the rest
of the Criminals, who are not got personally.*

Upon the — Day of — 17 — Years, I
J. G. Macer to the Justiciary Court, past at Com-
mand of criminal Letters, raised at the Instance
of A. B. with Concourse of D. F. his Majesty's
Advocate, for his Highness Interest, and by
Virtue thereof in his Majesty's Name and Autho-
rity, commanded and charged D. E. E. F and E.
G. to compear and to come and find sufficient Cau-
tion and Soverty, acted in the Books of Adjourn-
ment, that they shall compear before the Lords
Justice General, Justice Clerk and Commission-
ers of Justiciary, within the Tolbooth or Crimi-
nal Court House of *Edinburgh*, the — Day of
— next to come, in the Hour of Cause, there-
to underly the Law, for the Crimes within
mentioned, and that within the Space, under
the Pains, and made Certification, as is within
expressed. This I did, after the Form and Te-
nor of the said criminal Letters in all Points,
which

before the Justiciary Court. 215

which are dated and signet at *Edinburgh*, the
—— Day of ———, by leaving a full
Double of the said Letters, with a List of
the Assizers Names and Designations that are
to pass upon their Assize, and a List of the
Witnesses Names and Designations that are
to be adduced against them, with a short
Copy by Way of Charge, subjoined thereto,
subscribed by me, upon the said —— Day of
—— to the said *D. E. E. F.* and *F. G.* (with their
Wives, Sons, Daughters or Servants, with-
in their respective Dwelling-houses) and with-
in the Lock-holes of the most patent Doors of
their respective Dwelling-houses, after six seve-
ral Knocks given by me thereat, because I
could not get them personally apprehended.
And sicklike, upon the —— Day of ——
and Year foresaid, I past to the Market Cross
of —— Head Burgh of the Sherifffdom
thereof, within which Sherifffdom the said *D. E.*
E. F. and *F. G.* dwell and reside, and their Lands
ly; and thereat, after the crying of three se-
veral Oyesses, open Proclamation and pu-
blick Reading of the within written criminal
Letters, I, in Name and Authority foresaid,
commanded and charged the said *D. E. E. F.*
and *F. G.* to come and find sufficient Caution and
Soverty, acted in the Books of Adjournal, that
they shall compear before the said Lords, Day
and Place within contained; and that within

the Space, under the Pains, and made Certification, as is within exprest. This I did by affixing and leaving a full Double of the said Letters, with a List of the Assizers Names and Designations, that are to pass upon their Assize, and a List of the Witnesses Names and Designations, that are to be adduced against them, with a short Copy by Way of Charge, subjoined thereto, subscribed by me, at and upon the said Market Cross, for the said *D. E. E. F.* and *F. G.* because I could not get them personally apprehended. All which Copies did contain their said proper Dates, Witnesses Names and Designations therein insert, present thereat, and hereto subscribing; before these Witnesses — and — And for the more Verification hereof, I and the said Witnesses have subscribed the samen.

J. G. Macer.

If there is any marginal Note, or Notes on the Execution, the Messenger must not only sign the same, but also add these Words to the End of his Execution, *Witnesses also to the marginal Note or Notes*; and it is proper the Witnesses should also sign the Margine.

If there are any Writs libelled on, as lying in the Clerk's Hands, and these Writs being borrowed up on Receipt by the Pursuer, or his Doer, at taking out of the Letters; so soon as the

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before the Justiciary Court. 217

Defenders are served with a Copy of the Letters, they may call for the Writs, and see them in the Clerk's Hands. If they are not in the Clerk's Hands, he must call for them from the Pursuer or his Doer, conform to the Receipt. And if they are not produced in some short Time, it will be a strong Objection against the Libel, as not being in the Clerk's Hands, when called for, and Instruments taken thereon. For the Writs ought to be lodged in the Clerk's Hands Forty eight Hours before calling; if otherwise the Defenders may object thereagainst, and have the Diet deserted.

The Persons being charged, by Vertue of criminal Letters, to find Caution acted in the Books of Adjournal, if on the south Side of the Water of *Tay*, within six Days for their Compearance before the said Lords, which if they failie, they will be denounced, and registrate at the Horn, and a Caption taken out against them, for not finding Caution in the Terms of the Citation.

Follows the Form of the Caption against the Criminals for not finding Caution acted in the Books of Adjournal.

GEORGE, by the Grace of GOD, King of Great Britain, France and' Ireland, Defender of the Faith, To our Lovits

Macers, Messengers
at

at Arms, our Sheriffs in that Part, conjunctly and severally, specially constitute, Greeting. **FORASMUCHAS**, it is humbly meaned and complained to us by our Lovit *A. B.* with Concourse of *D. F.* our Advocate for our Interest, **THAT WHERE**, upon the — Day of — *D. E. E. F.* and *F. G.* were orderly denounced Rebels and put to the Horn; by vertue of criminal Letters raised at the Instance of the said Complainers against them, for not finding sufficient Caution, acted in our Books of Adjournal, for their Compearance before our Lords Justice General, Justice Clerk, and Commissioners of Justiciary, to underly the Law for the Crimes mentioned in the said criminal Letters, raised against them thereanent, as the said criminal Letters with the Executions thereof, duly registrate in our Books of Adjournal, conform to the Act of Parliament produced, bears. At the Process of which Horn, the said *D. E. E. F.* and *F. G.* Rebels foresaid, have continually lyen and bidden, and daily and continually haunts and frequents, and repairs to Kirk, Market and other publick Places within this our Kingdom, as if they were our free Leiges, in high Contempt of us, our Authority and Laws, and evil Example of others to commit the like in Time coming: **OUR WILL IS HEREFOR**, and we charge you strictly and command, that
in

before the Justiciary Court. 219

in continent thir our Letters seen ye pass, and in our Name and Authority command and charge the Sheriffs of the Sheriffdom of — and their Deputes, The Stewarts of the Stewartries of — and their Deputes, The Bailies of the Baileries of — and their Deputes, The Provost and Bailies of the Burghs of — and their Officers ; and all other Judges and Officers of the Law, to pass, search, seek, take and apprehend the Persons of the said *D. E. E. F.* and *F. G.* where ever they can or may be apprehended, within the Bounds of their respective Jurisdictions, put them in sure Ward, Firmance and Captivity, keep, hold and detain them thereintill, upon their own proper Charges and Expences, ay and while they fulfill and obey the Command and Charge of our said criminal Letters, and be orderly relaxed frae the Process of our Horn, within three Days next after they be charged thereto, under the Pain of Rebellion and putting of them to our Horn. With Certification to them if they failzie, our other Letters will be direct against them, for putting them thereto *simpliciter*. And also, that ye make stiked and Lock-fast Rooms and Doors open and patent, and use our Keys for that Effect. And if thir our Letters be put to Execution within our Burgh of *Edinburgh*, that the Concurrence of the Magistrates thereof be had
and

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and required thereto: According to Justice,
Ec. Given under our Signet, at *Edinburgh*
 the — Day of — and of our Reign the
 — Year 17.

*Ex deliberatione Dominorum Commissi-
 onariorum Justiciarum.*

J. D. Clerk.

These Letters are signet with their own
 Seal, and passes by a Bill, which the Clerk
 prepares, and writs on the Back thereof thus.
*Apud Edinburgum — die mensis — anno Do-
 mini — fiat ut petitur*, because the Lords
 have seen the registrate criminal Letters, and
 Executions thereof within mentioned, which
 Bill is signed by any of the Lords, and the
 Clerk signs on the Back of the Bill before
 presenting.

If any of the Criminals shall suffer them-
 selves to be imprisoned for not finding Cauti-
 on, or keep themselves out of the Way till
 the Day of Compearance, there will be an
 absolute Necessity for their being relaxed from
 the Horn, before they can have *personam
 standi in judicio ad hunc effectum* allenary; they
 cannot compear before the Lords till they be
 relaxed, and the Dyet continued for that End.

This is done, by giving in a Petition to
 the Lords, craving to be relaxed: Whereof
 the Tenor follows.

Unto

before the Justiciary Court. 221

*Unto the Right Honourable, the Lords Justice
Clerk and Commissioners of Justiciary,*

The PETITION of *D. E. E. F.* and
F. G. Prisoners in the Tolbooth of *Edin-*
burgh,

Humbly sheweth,

THAT where your Petitioners were de-
nounced Fugitives, and put to the Horn,
by Vertue of criminal Letters, raised at the
Instance of *A. B.* and *D. F.* his Maje-
sty's Advocate, for his Highness Interest, for
not finding Caution, acted in the Books of
Adjournal, for our Compearance before your
Lordships, within the Tolbooth or criminal
Court-house of *Edinburgh*, the ——— Day of
—— instant, there to underly the Law, for
the Crime of ——— alledged commit-
ted by us, in Manner mentioned in the cri-
minal Letters, raised against us thereanent;
and we being intirely innocent of the Crimes
laid to our Charge, which, through Ignorance
and not Contempt, made us neglect to find
Caution, in the Terms of the Citation, but
are now willing to be relaxed from the Horn,
and find Caution for our Compearance, any
Day.

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Day your Lordships shall appoint, and answer to any Libel raised, or to be raised against us thereanent.

May it therefore please your Lordships, to grant Warrant for Letters of Relaxation, and finding Caution, in Manner foresaid.

According to Justice, &c.

Follows the Interlocutor on the foresaid Petition.

The Lords Justice Clerk and Commissioners of Justiciary, having heard and considered the within Petition, grant Warrant for Letters of Relaxation; and ordain the Petitioners to find Caution for their Appearance, the ——— Day of ——— and that they shall attend the hail other Diets of Court, to the final End and Decision thereof.

A. C. I. P. D.

Follows the Letters of Relaxation, on the foresaid Petition and Interlocutor.

GEORGE, by the Grace of God, King of Great Britain, France and Ireland, Defender of the Faith, To our Lovits

Macers, Messengers
at Arms, our Sheriffs in that Part, conjunctly
and

before the Justiciary Court. 223

and severally, specially constitute, Greeting.
FORASMUCH AS, by Petition given in and presented to our Lords Justice Clerk and Commissioners of Justiciary, by *D. E. E. F.* and *F. G.* Prisoners in the Tolbooth of *Edinburgh*, humbly shewing, That where the Petitioners were denounced fugitives, and put to the Horn, by Vertue of criminal Letters, raised at the Instance of *A. B.* and *D. F.* his Majesty's Advocate, for his Highness Interest, for not finding sufficient Caution acted in the Books of Adjournal, for their Compearance before their Lordships, within the Tolbooth or criminal Court-house of *Edinburgh* the — Day of — Instant, there to underly the Law for the Crimes of — alledged committed by them in Manner mentioned in the criminal Letters raised against them thereanent; and they being intirely innocent of the Crimes laid to their Charge, which thro' Ignorance and not Contempt, made them neglect to find Caution in the Terms of the Citation, but are now willing to be relaxed from the Horn, and find Caution for their Compearance any Day their Lordships should appoint, to answer to any Libel raised or to be raised against them, as the said Petition bears. Which Petition being heard seen and considered by our said Lords, Justice Clerk and
Com-

Commissioners of Justiciary, they, by their Deliverance thereon, of the Day and Date of thir Presents, ordained thir our Letters to be direct thereon, in Manner under written. **OUR WILL IS HEREOFRE,** and we charge you strictly and command, that in continent thir our Letters seen, ye pass to the Market Cross of *Edinburgh*, and other Places needful, and there in our Name and Authority relax the said *D. E. E. F.* and *F. G.* from the Process of Denunciation led against them, restore them to our Peace again, and deliver to them, or any in their Name, the Wand thereof, *ad hunc effectum* allenarly, that they may have *personam standi in judicio*, for proponing such Defences against the above-mentioned Libel, as they shall think fit; and that ye within fifteen Days thereafter cause registre thir our Letters, with the Executions thereof, in our Books of Adjournal, conform to the Act of Parliament made thereanent. According to Justice. Because *D. B.* is become Cautioner for the Petitioners Compearance, and for Payment of the Sum of— for their Escheat Goods; as ye will answer to us thereupon. The which to do we commit to you conjunctly and severally our full Power, by thir our Letters delivering them by you duly execute and indorsed again to the bearer. Given under our Signet, at *Edinburgh*,
the

before the Justiciary Court. 225

the — Day of — and of our Reign
the — Year 17 —.

*Per actum Dominorum Commissio-
narium Justiciarum.*

J. D. Clerk.

The Letters are signet with their own Seal.

These Letters are execute by a Macer or Messenger, who returns an Execution thereof, and this Execution with the Letters are registrate in the Books of Adjournal.

The Criminals, after they are relaxed, can appear to have their Trial brought to a Conclusion, whether they be in Prison or under Caution. After the Criminals are relaxed, a Bond of Caution is written out for their Compearance, the Tenor whereof follows.

Bond of Cautionry for Compearance.

I *A. G.* bind and oblige me, my Heirs, Executors and Successors, as Cautioner and Soverty, acted in the Books of Adjournal, for *D. E. E. F.* and *F. G.* That they shall compear before the Lords Justice General, Justice Clerk and Commissioners of Justiciary,

P

within

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within the Tolbooth or criminal Court-house of *Edinburgh*, the — Day of — next to come, in the Hour of Cause, there to underly the Law, for the Crime of — alledged committed by them, in Manner mentioned in the criminal Letters, raised against them and others thereanent; and also that they shall compear the whole other Diets of Court, to the final End and Decision thereof, and that under the Pains contained in the Acts of Parliament. And the said *D. E. E. F.* and *F. G.* bind and oblige them conjunctly and severally, their Heirs, Executors and Successors, for their Cautioner's Relief in the Premisses.

A. G.
D. E.
E. F.
F. G.

This last Caution takes off the former Caution for Appearance, any Time within the Space of six Months.

The criminal Letters, with the Executions against Parties, Witnesses and Assizers, must be given in the *Saturday* before the Day of Compearance, to the Clerk of Court, that the Pannels Procurators may see the same, and propone Objections, if they any have, against them.

If

before the Justiciary Court. 227

If the private Pursuer of the Letters, who finds Caution for reporting thereof, do not report the Letters duly execute, before or on the Day of Compearance, then the Cautioner will be unlawed, for not reporting the same, conform to the Criminals Qualities. *Vide Ja. VI. Par. 6. Cap. 166.*

When there is any criminal Letters raised at the Advocate's Instance, he finds no Caution for reporting thereof; but must return them to the Clerk of Court, with the Executions, 24 Hours before Calling.

The Day of Compearance being come, the Clerk after calling the Witnesses and Assizers, and the Lords being set on the Bench, inserts the *Sederunt* of the Judges present.

*Curia justiciarum S. D. N. Regis, tenta in
pratorio burgi de Edinburgh — die mensis
— anno domini — per honorabiles viros
— justiciarium clericum dominos —
— — — & — commissarios
justiciarum dict. S. D. N. regis.*

Curia legitime affirmata.

The Preses causes call the Cause; the same being called, and some of the Criminals com-
eering, enter the Pannal.

P 2

The

The rest of the Criminals, that are under Caution, not appearing when called, they are declared Fugitives, and the Cautioner unlaw-ed (conform to the Criminal's Qualities, in the Terms of the Act of Parliament) which the Clerk pronounces to the Macer thus.

The Lords Justice Clerk and Commissioners of Justiciary, decern and adjudge *D. E. E. F.* and *F. G.* to be Outlaws and Fugitives from his Majesty's Laws, and ordain them to be put to the Horn, and all their moveable Goods and Gear to be Escheat, and inbrought to his Majesty's Use, for their not compearing, to underly the Law, for the Crimes mentioned in the criminal Letters, raised at the Instance of *A. B.* and *D. F.* his Majesty's Advocate, for his Highness Interest, against them thereanent, as they who were lawfully cited for that Effect. And ordain the Bond of Cautionry, given for their Compearance, to be forfeited.

A. C. I. P. D.

These, and the former Unlaws, are likewise given up by the Clerk to the Court of Exchequer on Oath, who levies the same, if not taken off by Petition to the Lords.

If there be no Accusers to insist against the Pannels, then the Lords will desert the Diet against them.

And

before the Justiciary Court. 229

And in case the Pursuers be apprised with any Informality in the Libel or Executions, they may desert the Diet, *pro loco & tempore*, and raise new Letters.

But if the Pursuers are there present, and ready to insist, then the Clerk inserts in the in the Book thus.

Intran.

A. C. C. D. and *D. E.* indicted and accused at the Instance of *A. B.* and *D. F.* his Majesty's Advocate, for his Highness Interest, as guilty of a Blood-wet or Battery, &c. committed by them, in Manner mentioned in the criminal Letters, raised against them and others thereanent.

Pursuers.

Mr. *D. F.* his Majesty's Advocate,
Mr. *C. E.* his Majesty's Solicitor,
Mrs. *J. B.* and *J. F.* Advocates.

Procurators in Defence.

Mr. *J. G.* } Advocates.
Mr. *R. D.* }

The Preses desires the Clerk to read the Libel; and after reading thereof, the Preses
P 3 asks

ask the Pannels, What they have to say to their Indictment? The Pannels deny the Crime laid to their Charge, or as it is libelled.

Thereafter the Procurators, or Advocates for the Pannels, alledge for them in Defence, That against the Relevancy of the first Part of the Libel, charging them severally with the direct Commission of the Crime, they need make no Objection, &c. (Here the Lawyers for the Pannels debate the Relevancy of the Libel *viva voce*.) This is in Place of the Custom formerly observed in the Court, of Advocates dictating and Clerks writing of the Defences, Duplies, Triplies, Quadruplies, &c. for the Pursuers and Pannels, as before mentioned, *Pages 100 and 101.*

If there are any Nullities to be proponed against the Libel or Indictment, the Lawyers for the Pannels begin with them first, and thereafter go on to their other Defences.

After the Lawyers have ended their Pleaings, the Lords ordain the Pursuers to give in their Informations to the Clerk of Court, in order to be recorded, as is mentioned in *Page 103.*

INFOR-

INFORMATION for A. B. of — and
his Majesty's Advocate,

A G A I N S T

— — — A. C. and C. D. Pannels.

THE Pannels stand accused of a most outrageous Riot, accompanied with such Circumstances of Barbarity and Cruelty, that it is not easy to be conceived, that any human Creature would possibly have been Actor in it. If every particular of the bloody Scene could not be clearly vouched, the jostling of any Person when walking peaceably on the King's High-street, and giving opprobrious Language, is doubtless a great Offence; and it is still a greater Crime for several Persons, after a deliberate Consultation and Combination, to arm themselves with Stones and other offensive Weapons, and assault a Gentleman, but after that this Gentleman had been oppressed by their Numbers, and had called out for Mercy, from the Hands of his Fellow-creatures, for God's Sake, that this should have no other Influence upon the Assaulters, but to cause them re-double their Violence, and with horrible Blasphemies to cry out, *No Mercy, but that he should die like a Dog;* and in order to put their Threats in Execution, threw great Stones upon his Head, where-

by his Scull was broke, is to screw Malice and Wickedness to such a Pitch, as leaves no Place for any other Aggrayation.

These are the Crimes for which the Pannels are indicted, and the first Part of the Libel sets forth the full Fact, which the Pannels admitted to be relevant; But by Reason that the Pannels have acted with so much Caution, as to cause put out the Light which they had with them, as likewise all other Lights which were in the Houses upon the Street, that they who were conscious of the Wickedness of the Action they were going about, might not be discovered; there are therefore in the second Part of the Libel, several Circumstances set forth, for inferring the bloody Fact, which is admitted on all Hands to have been committed the Day and Place libelled, was perpetrated by the Pannels. And tho' these Circumstances and Qualifications are so closely connected, that if there was nothing else in the Libel, or in the Defence offered for the Pannels, that they were *constituti in periculo vite*, when the Fact was committed. These Circumstances, if proven, do amount to as plain a Demonstration of the Persons, who were the Actors, as if any two or credible Witnesses were swearing upon the Fact; and yet the Pannels have thought fit at the hearing in the Cause, to insist upon several Objections

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to the Relevancy of this Part of the Libel, and at the same Time they pled a Defence to the whole, that what was done by them was *se defendendo*. And there was an Exculpation offered for some of the Pannels.

The Sum of the Objections against the second Part of the Libel, were, "That tho' the Libel mentions all the Pannels to have been with the Pursuer on the Street of L. so that supposing they had been the Persons, who had taken the Stones and thrown them, as the Libel bears, towards the Place where the Pursuer was standing, such Stones could have done him no Harm; and therefore from the Circumstances of the Libel, it is more presumable that the Pursuer has got his Wounds by some other Occasion.

But, as the Pannels endeavour to separate each Circumstance and Article of this Part of the Libel, that it may be deprived of the Support and Force it receives from the other; so as to this Article, they manifestly suppress the clear Words in the Libel, which bears, that after the Pannels had separate from the Pursuer, and gone on without their Lantern, and tho' he had not walked so fast as the Pannels did, being willing to get rid of such Company, yet considering the Time that the Pannels took in preparing their Artillery, if the Pursuer walked at all alongst the Street, as the Libel

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Libel bears he did, he must have been come to that Part of the Street where he was assaulted with the Volley of Stones.

2^{do}, The Place where the Pursuer was attacked, and that the same was within reach of the Stones thrown by the Pannels, appears further, that the Servant who carried the Lantern before the Pursuer, was beat by the Persons, who made this Assault; so that if the Stones thrown by the Pannels reached this Person, who was attending the Pursuer, and beat out his Lantern, there can be no Doubt, but that the Pursuer had moved forward and had come within the reach of those Stones that were thrown.

3^{tio}, The Pursuer being found at some Door, as the Libel bears, immediately after the Assailants, who ever they were, had gone off, and in such a Condition as he was not able to walk, must put the Matter beyond all Question, that the Pursuer received the Strokes where he was found.

But then the Pannels say, " That this Part
 " of the Libel does not bear, that it was them
 " who were the Aggressors, or the Persons
 " who threw the Stones, or gave the Strokes
 " libelled. There had been a Race at L. that
 " Day, which occasioned, as is usual, a Con-
 " course of People in the Town; there were
 " many Persons, as well as the Pannels, upon
 the

“ the Street, even at that Time at Night, the
“ Stones might have been thrown, and the
“ Strokes given by these other Persons, as well
“ as by the Pannels; and the Presumption be-
“ ing always for Innocence, it ought at least to
“ have been libelled, that they were amongst
“ the Persons who made the Assault upon the
“ Pursuer by throwing of Stones.”

In answer, your Lordships will observe, that the Pannels have not adventured to name any one Person, who was upon the Streets, other than they themselves and the Pursuer, and the Persons with him. It must be therefore left with your Lordships to consider, that if the Pannels were not the Persons who assaulted the Pursuer, where were they at this Time, or what were they doing? Upon the Streets they behooved to be, for they have not said, far less offered to prove they were else where, and altho' an *nuda assistantia*, where that is clearly qualified, and these who were Actors likewise clearly pointed out and condescended upon, may be less Criminal, yet where none of these Things occur, the Persons who were upon the Spot, when the Fact was committed, will in Law be taken as the Authors.

2dly, It is libelled, That the Servant, who carried the Lantern before the Pannels, was upon the Place, when the Assault with the
Stones

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Stones began, which necessarily imports, that the Pannels were there likewise.

3dly. It is libelled, That Orders were given to *A. F.* to retire, and go off; and it will not be supposed, considering what Disposition these Gentlemen were in, that they would have allowed any other Person but themselves, to beat off their Servant.

Lastly, Join with this the Pannels absconding, after the Fact was committed, and the Concern they were in about the Pursuer's Health; and there cannot remain the least Shadow for Doubt, that the Pannels were the Persons, who were the Actors in this last Scene.

The Pannels indeed, to evade the Strength of this Qualification, have alledged, *That soon after the Fact was committed they appeared publicly.*

And it may be, that after the second and third Dressing of the Pursuer's Wounds, when it appeared, that immediate Death was not to follow upon the Fracture in the Scull, the Pannels did adventure to come out of their lurking Places, and shew themselves Abroad; but then, in some Days thereafter, when the Pursuer fevered, and that the Consequence of this Fever was uncertain, all of them disappeared, which could proceed from Nothing, but the Consciousness of their Guilt.

But

before the Justiciary Court. 237

But it is in vain for them to pretend, That this was to avoid the *squalor carceris*, upon their knowing that a Warrant was out to apprehend them ; because if they could shew themselves to be innocent, they might well know, that the Justice of the Laws would render their Imprisonment very short ; and their Absence for the Time, if the Pursuer had died, could not have saved them, from Imprisonment for such Time, at least till they had shown their Innocence, unless they had resolved to abscond for ever, which it seems was truly the Design of their Flight : And therefore they did not thereafter appear, till the Pursuer was quite out of Hazard, and they knew the Crime was not capital.

It likewise merits Observation, That the Pannels all absconded at the same Time, to closs a Correspondence they kept amongst themselves, even after the Crime was committed : And it is but a poor Excuse, *That they had Business which brought them to the Country* ; for tho' it is easie to contrive Occasions for Business, to give Colour to their Retirement ; yet it must seem pretty odd, that this Business should come all at once upon four of the Pannels, while the fifth, who thought himself safest in the Town of *E——* lurked and absconded. And it is yet more extraordinary, That this Clap of Business should
come

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come upon theſe Pannels, precisely at the Nick of the Purſuer's Fevering: But theſe Matters appear in too ſtrong a Light, to be darkned with ſo thin a Vail.

And as to the Pretence, *That Flight of it ſelf is not a Circumſtance, which neceſſarily implies Guilt*; the Purſuer pretends to no more, but that it is a ſtrong Circumſtance, to denote the Perſon Author of the Crime, when concurring with other Qualifications, ſuch as theſe libelled; and ſo it has been ſuſtained in ſeveral Caſes; ſuch as Sir Godfrey M'Culloch's and others, even to infer a capital Punishment, where the other Circumſtances were not ſtrong, as here they appear to be. And in our neighbouring Nation, ſo great Weight is laid upon this Qualification of Guilt, that it is a conſtant Article put to the Jury to return, whether the Perſon is fled or not?

As to the Defence, which the Pannels pled to both Articles of the Libel, " That what
" was done by them was in ſelf Defence;
" and that they were *conſtituti in periculo vitæ*;
" in ſo far as the Purſuer and his Servant
" had out their Swords, and were making
" up towards the Pannels, who could not flee,
" leaſt if they had fallen in the Flight, and
" ſo have been overtaken, they might have
" been at the Mercy of the Purſuer: And
" therefore were obliged to provide them-
" ſelves

“ selves with Stones, in order to disable
“ the Pursuer from coming up with them.”

As the Defence stands, the Pursuer conceives it not relevant. *First*, Because it is entirely contrary to the Libel, which only appears in the first Part of it, that the Pursuer was assaulted without any just Provocation. But in the *Second Place*, That he was assaulted with a great Volley of Stones, thrown to the Place where the Pursuer was standing on the Street. And that he was afterwards assaulted, on the Side of the Street, towards which he had retired for his Safety. All this is inconsistent with what is laid in the Defence, that *A. B.* was in Pursuit of the Pannels with a drawn Sword.

But *2do.* The Defence of Self-defence is never sustained, but when the Parties are *constituti in ultimo discrimine vite*, that is, when the Attack is so close, as that there is no Possibility of Escape, but by the Parties offending the Person who attacks. Now the Pannels in this Case, have qualified no such Thing. All they say is, *That A. B. was pursuing them with a drawn Sword*: And however contrary to Truth even this Allegedance will be found to be; yet a Pursuit, when the Pannels had the Advantage of the Distance, will never amount to that necessary Qualification of self Defence, that the Pannels were in
eminent

eminent Danger of their Lives, especially considering the Number of the Pannels against a single Man.

3th. Were the Pannels *constituti in periculo vite*, when the Pursuer called out for Mercy, at which Time little more Hurt was done, than some Bruises he had received, from Stones thrown at a Distance, whereby he was disabled, and some Strokes which he had received, with Staves and Rungs; and when the Pannels, finding him so disabled, did approach near to him; certainly this cannot be alledged with any Shew of Reason; and yet it is libelled and will be proven, that after all this the Pursuer received from them the Wound in the Forehead with a Stone; and that they persisted in beating and bruising him, with Rungs and Staves, till he was left as dead upon the Spot; and for these Reasons, this Defence ought to be repelled.

Upon the whole Matter your Lordships have before you a Case, the like for its Atrocity, Barbarity and Cruelty, has but very rarely occurred; and as the Pannels have made no Defence against the first Part of the Libel, so it is hoped, that as little can be argued, with any Shew of Reason, against the second. While on the other Hand, nothing appears in Defence, but Inconsistencies and Contradictions, which can never be agreeable to
Truth

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Truth and Reason, which are always single and uniform. The Pannels at one Time alledge, the Pursuer was drunk; and other Times, that they dared not adventure to flee, least he should have overtaken them. In one Part of their Defence, they deny it was them who threw the Stones, or so much as they were upon the Spot, tho' they cannot condescend in what other Place they were. And in a little thereafter, they confidently affirm, and undertake to prove the Fact, that they were upon the Place, and that they did throw the Stones, to defend themselves against the Pursuer, who was pursuing them with a drawn Sword.

*In Respect whereof, the Defences
proponed for the Pannels ought to
be repelled, and the Libel sustain-
ed relevant, to the Pursuer's Pro-
bation, and remitted to the Know-
ledge of an Assize.*

D. F.

Q

INFOR.

INFORMATION for *A. C.* and *C. D.*

A G A I N S T

A. B. and his Majesty's Advocate for his Highness Interest.

TH E Pannels cannot but account it the greatest Misfortune of their Life, that in their first Entry upon the Stage of the World, they have been so much as suspected guilty of so atrocious an Offence, as the Crimes wherewith they now stand charged, are represented; and they are likewise sensible of the Disadvantages they ly under in their Defence, against a Crime said to have been attended with so much Cruelty and Babarity. All Mankind commonly conceive themselves interested in the Punishment of such an Offence; and if the Party injured can, even by false Rumors or groundless Suspicions fix the Guilt, in the Opinion of the World, upon any particular Person, any Defences that can be offered for the Pursuer appear under the greatest Disadvantages: The Bowels of Compassion, that a barbarous Crime naturally raises towards the Party injured, makes them unwilling to be-

lieve

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lieve it possible, that the Person suspected of the Crime can be Innocent.

The Pursuer has made all the Advantage he can of this Part of humane Frailty, and has with great Art painted the Crime where-with the Pannels are charged in the blackest Colours both in his Libel and Information; with a Design to pre-possess the World against the Pannels, that tho' he is not able to bring a direct Proof of their Guilt, yet rather than no Person should be punished, it may be fixt upon them by groundless remote Suspicions, that scarce have the least Connection with the Crime, other than, that if these Circumstances are true, it is barely possible they might have been the Actors: Nay, such a length has the Pursuer gone in this Argument, that tho' the Riot happened in the Street, where there were a great many Persons returning from a Race that had been that Day at *L* —, and tho' it was in a Pitch-dark Night, when scarce one Face could be distinguished from another, yet, if the Pannels were upon the Street at that Time, he will have that of it self sufficient to fix the Guilt upon them, unless they will condescend and prove not only who were these Persons upon the Street, but likewise, who were the Actors in the Insult committed against him, that is in other Words, they must either find some other Per-

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sons to punish, or they themselves must suffer as the Criminals.

The Pannels indeed make no Doubt that the Pursuer has suffered very severely, and as sorry for his Misfortune as any Mortal; but at the same Time, as they are conscious of their own Innocence, they do all of them severally deny the Libel, and hail Circumstances therein contained, and they account it their great Happiness, that they have this Opportunity of justifying themselves, and that they are to be tried before Judges, that have too much Knowledge of our Laws, to allow themselves to receive any Impressions, from the artful Method in which the Charge is laid against them, and that their Defence will be received with the same Favour and Impartiality, that is due to all other Defenders, and that notwithstanding the Pursuers strong Allegations, they will be believed Innocent until the contrary is made appear. And the more cruel and barbarous, and inconsistent with Humanity the Action is represented, that the Presumption for their Innocency will proportionably be deemed the stronger.

Against the Relevancy of the first Part of the Libel, charging them severally with the direct Commission of the Crime, they indeed make no Objection: But then, the second Part of the Libel, the special Circumstances from
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which their Guilt is endeavoured to be inferred, they hope to satisfy your Lordships, are not such as can infer the least Suspicion against them; and at the same Time, that they object against the Relevancy of this Branch of the Libel, they hope to be able to prove such a Defence as, admitting for once, they had been the unhappy Actors, must not only in the Eyes of the World, but in any Court of Justice, be sufficient to justify them, and lay the whole Blame of what ensued upon the Pursuer himself.

And here the Pannels must again complain of the Pursuers Management in this Tryal; their very offering a Defence against the Libel, is made *per se* a Proof of their Guilt, as if it were not allowable to a Defender in a criminal Cause, both to deny the Crime, and at the same Time offer a Defence, that presupposes the Charge is true: When the Pannels shall come to open their Defence, your Lordships will perceive, that in the present Case, it does not even import, that the Pannels are in the least accessory to the Crimes wherewith they are charged: But admitting it did, is it not lawful for a Pannel to deny the Libel, and at the same Time to offer a Defence, that presupposes the Libel is true? Cannot a Pannel be allowed to prove Self-defence, to exclude a Charge of Murder, without making

his very proponing that Defence, an additional Evidence of his being the Person guilty? This surely is not agreeable to the ordinary Rules in criminal Trials.

Against the *second* Branch of the Libel it might be observed, that no Presumptions of any Sort whatever, are sufficient to infer the Guilt of a Crime. The Law indeed has allowed of a Proof by *indicia*, that is, the natural necessary Consequences of the Crime, and no Precedent can be shown, where Presumptions have, by the Court of Justiciary, been found relevant, except where such *indicia* were enjoined: For Instance, as a bloody bowed Sword, in the Case of *Steuart-Abercromby*, and even these *indicia* that the Law require, are described *certa & indubitata, ac luce clariora. L. ult. cod. de probationibus*. But then as to weaker Presumptions, the Law expressly says, *Nec ex suspicionibus debere aliquem damnari, satius enim est impunitum relinqui facinus nocentis quam innocentem damnari, L. 5. ff. de pœnis*.

But without entering further into this Dispute, and admitting for once, that strong and violent Presumptions, that is, such as the Law describes *certa ac indubitata*, were sufficient to infer the Guilt of a Crime, what the Panels are to lay before your Lordships, is, whether the Facts and Circumstances set forth

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in this *second* Branch of the Libel, are such as agree with the Rule prescribed in these Laws.

The principal Circumstances laid in this Part of the Libel, are, that all the Pannels past by the Pursuer, that some high Words past among them; but, without explaining whether these high Words past between the Pannels themselves, or between them and the Pursuer's Company, that thereafter the Pannels walked forward and left the Pursuer. Then the Libel bears, That at that Time, a great Volley of Stones were thrown towards the Place the Pursuer was standing, then Hundreds of Strokes laid on some Person on the Street, and immediately thereafter the Pursuer found wounded and bleeding.

The Pursuer has no Doubt libelled the strongest Circumstances he imagines he will be able to prove, these are the Circumstances, upon which he would have the Relevancy determined, and all he undertakes to prove; and therefore what falls here to be considered, is, whether, supposing these Facts and Circumstances were proven, they necessarily infer the Pannels Guilt, that they were the Authors of the Wounds and Bruises the Pursuer received.

And in the Pannels Apprehension, all these Things joined together amount to no more but this, that the Pursuer was at one End of

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the Street and the Pannels at the other, at that Time Stones were thrown and Strokes given to some Person, but whether these Stones were thrown from the End where the Pursuer was, or from the End where the Pannels were, the Libel does not explain, that the Pursuer thereafter was found wounded, and that therefore the Pannels must have been the Persons that wounded him.

The Relevancy doubtless must be determined only upon the Facts laid in the Libel, and on no other; the Libel does not bear that the Pursuer and Pannels were nearer other than the two Ends of the Street, nor does so much as bear, that the Pursuer was at G. B's Door where the Person is said to have been beat; and if that was the Case, so far are these Circumstances from inferring a Presumption of Guilt against the Pannels that they render it utterly impossible, that they could have been the Actors of what is now charged against them.

As to the first, 'tis true, the Libel bears, That the Pursuer was walking along the Street, when the Pannels came up to him; but then the Argument does not rest there, the very first Part of the Riot is libelled in these Words, *And then a great Volley of Stones were thrown towards the Place where the Pursuer was standing.* Here then is a direct Proof from the Libel

it self, that before the Assault, he was not walking, but standing on the Street.

Ando, Neither does the Libel bear, that he was found wounded at G. B's Door; nay, the very contrary is directly implied. The Words are, *That a great Volley of Stones were thrown towards the Place where the said Pursuer was standing on the Street* aforesaid, and afterwards towards the Door of G. B. 'Tis impossible to understand this otherwise, than that the Place where the Pursuer was standing on the Street, and G. B's Door were two different Places.

But then in the second Place, Altho' the Libel had bore expressly, that the Pursuer was at G. B's Door, and the Pannels at G. M's, or even tho' they had been much nearer one another, these Places being above the Distance of a Stone Cast, the Objection against this Part of the Libel is much stronger on a separate Account. The Circumstance of a Person's being upon the Place where a Crime is committed, infers a Presumption of Guilt in no other Case whatsoever, than when it is likewise libelled, and offered to be proven, that no other Person was present, who possibly might have committed the Crime, for if that is not expressly libelled, a Person's being present when a Crime is committed, imports no more than a bare possibility, that he might have been the Actor,
without

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without which Circumstance, it is impossible he could; but does not infer the least Presumption, or even Suspicion of Guilt against him. 'Tis not alleged in the Libel, nor indeed could it with any Consistency to Truth, that there was none other on the Streets besides thir Pannels. The Pursuer's Misfortune, as is already noticed, happened on a Night after a Race, when it cannot be doubted, and if needful, can be proven, that a good many Persons were on the Streets, besides the Pursuer's Company and the Pannels. Surely the walking on the Streets was no Crime. What Circumstances is there that fixes the Guilt upon the Pannels more than any other Person on the Street? Every single Circumstance in this Part of the Libel may be true, and yet these Gentlemen not have the least Accession to this Delict; and therefore these Circumstances never can infer a Relevancy against them.

In the next Place, This Observation is still of the greater Force, that there are Three Persons given out in the List of Witnesses, who, it can be proved, and who the Pursuer must own, appear by the Precognition, to be of the Pannels Company, and are yet dropt in the Prosecution, and brought as Witnesses to load the Guilt upon the Pannels. The Observation the Pannels here make from it, is, That every single Circumstance libelled may possibly

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possibly be true, that all these Circumstances may be swore to, and swore truly by these Witnesses, and yet they themselves have been the only Persons guilty, and the Pannels wholly innocent.

Nay let it be supposed, There was none other upon the Streets than these Pannels, what would be the Effect of sustaining a Libel so conceived? It is true indeed the Presumption would be very strong, that one or other of them must have been the Persons guilty, and such as were guilty ought no Doubt to be punished. But it is equally certain, that some of them might have been innocent; the being of the Company was of it self no Crime; there at least three of the Company, that the Pursuer himself must admit are in that Case, and doubtless others may have been innocent likewise; and it would be a Cruelty, even surpassing that committed on the Pursuer, to punish, under the Colour of Justice, the Innocent with the Guilty. But were this Part of the Libel relevant, Innocence could be no Protection; the walking with that Company, and being on the Streets at the Time, must be equally criminal, as if they had actually imbrued their Hands in the Pursuer's Blood.

Certain other accidental Circumstances are mentioned in the Libel, but which have no Manner of Connection with the Crime; and
thousands

thousands of such could not be of the least Force to support the Relevancy. It is said, That the Person, who carried the Lantern before the Pannels, was about that Time sent Home, but without telling by whom. The Truth is, That as the Pannels had little further Use for him, after they had past the dirty Part of the Road, that is the Streets of *L.* and had only a plain clean Road to walk, so they had no Inclination of being at the Charge of carrying him to Town; and therefore they never proposed his lighting them farther than through the Town. But in all Events, what possible Advantage can the Pursuer make of this Fact? Had the Pannels indeed been afraid of any Insult from the Pursuer, the sending away the Lantern would have been a very just Precaution, because it must have discovered to him where to follow them. But if on the other Hand, they had intended any Injury to the Pursuer, it was the worst Way in the World, in a dark Night, to accomplish their Design, to dismiss their Light; because that was a necessary Mean of finding him out: But how that can afford an Argument of the Pannels Guilt, very much exceeds their Comprehension. It is indeed further alledged in the Debate, That the Pannels ordered the putting out the other Lights in the Streets, which, it is supposed, is intended only as an Amusement;

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Amusement; since the Pursuer knows it cannot be admitted to Proof; no Relevancy can be founded upon it, since it is not libelled.

The last Qualification mentioned in the Libel, is, " That the Pannels the next Day fled " or absconded."

As to which in the *first* Place, If the Pursuer intended to found upon this, as an Evidence of their Guilt, he ought certainly to have condescended upon the particular Circumstances and Qualifications of that Flight or Absconding, so as that your Lordships might judge of the Relevancy; their going to their respective dwelling Houses, or to the Tavern, or about their lawful Affairs, may perhaps be brought in Evidence of such Flight or Absconding; and likewise, that the Pannels might not be deprived of their lawful Defences, by proving the Occasions of their going to such Places, or that they were *alibi*: And for that Reason it is, that the Time and Place of committing any Crime must always be condescended upon: And it were just as reasonable to sustain a Libel for a Crime, without condescending upon either Time or Place, as to sustain a general Alledgance of Flying or Absconding, as an Evidence of the Guilt of a Crime, without condescending upon the Place where they did flee and abscond.

2do. It is not Absconding after one is suspected of a Crime, thereby to evite the *squalor carceris*, that founds any Suspicion against a Pannel; it is only the flying and absconding from Justice, when they are charged to stand a Trial. Imprisonment is by it self a severe Punishment, and is very often made the only Punishment of petty enormous Crimes. How then can it be imagined, that the most innocent Man upon Earth, that had the Misfortune to be suspected of a Crime, would willingly submit to so great a Hardship, while it depended upon the Pleasure of his Accuser, to continue him some Months in Prison, before bringing him to a Trial, whether guilty or not?

3tio. Flight, even in the Sense of Law, imports at most no more than a Kind of Suspicion, but comes not the Length of a Presumption. And the Law says, That no Man is to be condemned of Suspicion, nor was ever Flight, even in the properest Sense, either in Sir Godfrey M'Culloch's, or any other Case, deemed of any great Weight, to infer the Guilt of a Crime; and in this respect there is no Difference, what ever be the Nature of the Crime, or the Punishment. The same Proof is requisite, where the proper Punishment of the Crime is only arbitrary, as where it is capital. And the Observation upon

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on the Practice of the neighbouring Nation, that it is a Part of the Charge given to the Jury, whether the Prisoner fled or not, is quite foreign to the Purpose. That Charge is given, not at all as an Evidence of the Prisoner's Guilt of the Crime, but upon a separate Account, and the Jury must return a Verdict upon that Point, even tho' they should find the Prisoner not guilty of the Crime laid to his Charge.

And in the *last* Place, it is, if needful, offered to be proven, That the next Day, the Time condescended upon in the Libel, and several Days after, all the Pannels appeared as usual in the Streets, at the Cross, in the Coffee-houses, and other publick Places.

As to this the Pursuer alledges, That it is possible, after it appeared that immediate Death had not followed, that is, after the second and third Dressing, the Pannels might have peeped out of their lurking Places; but that after the Fever, when the Event became uncertain, they again absconded and fled.

But with Submission, this is no ordinary Way of reasoning upon a criminal Libel. The Libel bears, they absconded the next Day; the Pannels offer to prove the contrary. And then the Pursuer tells a new Story, never before heard of, and which, as he is not able to prove, so he knows it cannot go into an Interlocutor,

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terlocutor, because not libelled. When the second or third Dressings were, is not told. The Pannels are likewise left to conjecture, when it was he fevered; neither is it explained in what Way they absconded; and if they appeared after the second or third Dressing, which is acknowledged, and when the Hazard of a Fever was not over; what can it avail what they did afterwards, which is not so much as libelled?

But supposing for once, These young Gentlemen had, to preserve their personal Liberty, absconded, after the Pursuer had procured a Warrant for their Imprisonment, and which he rigorously executed, even to the Pitch of refusing Bail, against some of the Company, whom he now must own, he believes innocent; what Man, that has the least Notion of Confinement, can blame them, or suspect them one Bit the more of this Crime?

These are the Objections offered against the Relevancy.

And in the next Place, The Pannels offer certain Defences against the whole Libel, which, that they may appear in their proper Light, they must beg Leave to state the Fact.

When the Pannels and their Company were returning to Town, a Person running hard down a Wynd jostled, and had almost thrown
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over one of the Pannels, who thereupon happened to say, *What for a Scoundrel was that?* or some such other Expression: And immediately after that, they came up with the Pursuer and his Company; and having heard the former Expression, the first Salutation the Pannels received, on their joining Companies, was by the Pursuer's beating one of the Pannels over the Head with a Staff; and being calmly askt, by one of the Pannels, *For what Reason?* And the Pursuer, after giving him some vile opprobrious Names, not worth the repeating, askt him, *How he came to call Gentlemen Scoundrels?* And at the same Time, the Pursuer or his Servant drew their Swords. The Pannels soon discovered, that they were drunk, at least that they had drunk, as much as to make them exceeding quarrellsome; and for that Reason, and perhaps likewise, because the Pannels Company found themselves a very unequal Match for the Pursuer's, especially when they were so very unequally armed; this last being armed with Swords, which they appeared very well disposed to make Use of, and none of the Pannels having any Arms, all the Return the Pannel, who uttered the Expression, made to this Usage, was to beg Pardon, assuring the Pursuer, the Expression was not meant against any of his Company. And not satisfied with this Ac-

R knowledge.

knowledge, the Pursuer and his Servant pursued them, and did not stop, till by good Providence, several other Persons on the Street, and who had been no Part of the Pannels Company, seeing them pursued by Men with drawn Swords, out of Commiseration, and from that Principle that is natural, to help others in such Distress, threw some Stones, and stopt the Pursuer; and at that Time one of their Swords was not above two or three Yards Distance from one of the Pannels Back: So near was the Pursuer in turning the Tables, and being himself indicted for Murder, in Place of indicting the Pannels for a Riot. The Pannels Company however did not stop, till they were out of the Pursuer's Reach, and neither saw, nor knew any further about him.

This is the Fact, and this your Lordships perceive is very far from being an Acknowledgement of the Libel; they, nor neither of them threw any Stones, or gave any Strokes: But at the same Time, as they plead this, as a Defence against the Libel, they necessarily must plead it, upon the Supposition the Libel were true, that tho' they had thrown these Stones, yet they are nowise blameable, they were forced to it in Defence of their own Lives.

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The Pannels hope to be able to prove all these Facts, as above set forth: But then supposing, that the Darkness of the Night should deprive them of a Proof of some Circumstances, yet if they shall be able to prove, either that the Pursuer or his Servant, drew their Swords upon them, before any Stones were thrown, or any Violence offered. If therefore any of these shall be proven, they cannot doubt, that your Lordships will find that sufficient to justify every Thing that ensued, even supposing the Pannels had been the Persons that threw these Stones.

To this the Pursuer answers, " That the Defence is contrary to the Libel, which bears, that he was assaulted without any just Provocation. *2do.* That a Volley of Stones were first thrown at him, upon the Street next to the Door whither he had retired for Safety."

But this is not truly arguing upon a Libel, but making a new one; it neither bears, that he was at *G. B's.* Door, nor had he retired there for Safety. But whatever Way the Libel was framed, could that deprive the Pannels of the Defence of Self-defence? Is not that Defence in all Cases contrary to the Libel, which constantly bears, that the Crime was committed without any just Provocation? Besides, this is a Negative, which the Pursuer

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fuor cannot prove otherwise, than by our not proving a Provocation ; and the laying the Libel in this Way is an admitting, that if a just Provocation were proven, it will elide that Part of the Libel. Is not the Defence of *alibi* of the same Kind, and several other Defences, that your Lordships do now daily sustain, without Regard to the Objection of their being contrary to the Libel ?

The Pursuer's next Answer is, "That the pursuing them with drawn Swords, or the Pursuer and his Servant appearing with drawn Swords, did not put them *in ultimo discrimine vite*, especially considering the Distance betwixt them, and that there was so many against one single Man."

But it is hard to conceive what imports a *discrimen vite*, if being pursued with drawn Swords does it not. It seems the Pursuer would have had them wait till the Points of their Swords had been piercing their Clothes. Were the Pannels, when so attacked or threatened, obliged to wait till the Pursuer came so near, that no Mean of Defence was left them, at least that none remained, than the Chance of throwing one single Stone ? This is what no Law can require ; and if the Distance was great, surely the Pursuer was in the less Hazard, and might have more easily saved himself from the Stones or retired. And here
your

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your Lordships cannot but observe the Pursuer's Way of reasoning; when it makes for his Purpose, then the two Companies are close together, but when it makes against him, they are at a considerable Distance.

As to his being a single Man, it is offered to be proven, That his Company was in all four in Number, and even the Libel it self mentions some of them.

The Pursuer's *third* Answer is, " That the
" Pannels exceeded the *moderamen inculpatae*
" *tutela*; that they were not in any Danger,
" when he called for Mercy; and that the Li-
" bel bears, and will be proven, that he re-
" ceived the Wound in his Forehead, after
" his begging Mercy. "

As the Pannels are wholly innocent of the Crime laid to their Charge, though they are obliged to plead their Defence; so they, in some Sort, ly under a Disadvantage, in not knowing any Thing of this Circumstance, of begging Mercy, or of the Way the Pursuer was used; and therefore must plead the Case, as it appears from the Libel. And *first*, It is by no Means libelled, That this Wound in the Forehead was given after he called for Mercy; neither does it indeed appear very consistent, that it could have been so: For there was not found upon him either Stroke or Bruise, that could have disabled him, or even done him

any considerable Harm, but that single one; nor was there any other Wound upon him. And it can likewise be proven, That instead of lying wallowing in his Blood, he was found standing on his Feet, after all the Disaster was over. Now, how can it be imagined, that one so armed, and in the Temper he was in, would call for Mercy, before he received any considerable Hurt?

2do. Admitting for once, That the Stones had been thrown by the Pannels Company, and that some of them had exceeded the *moderamen inculpatæ tutelæ*; yet as the throwing the Stones, while they were in Hazard, was lawful, that Excess is only punishable in those, who were guilty of the Excess; but not in others, who only threw Stones, when it was necessary for their Defence.

3tio. Even as to those, who exceeded the *moderamen inculpatæ tutelæ*, the previous Assault made upon them, is not only relevant to alleviate, or mitigate the Punishment; but even wholly to exculpate them, that the exceeding the *moderamen inculpatæ tutelæ*, is not punishable with the ordinary Pains of Law due to the Crime; and that the previous Hazard of the Party's Life, doth mitigate that Punishment, even in the most atrocious Crime of Murder, is agreed upon by all Lawyers, that ever wrote on the Subject; and must of Consequence

quence have the same Effect, in every lesser Crime. But where the Question is only concerning a real Injury or Riot, and the Pursuit at the Instance of the private Party, it is humbly conceived, That the exceeding the *moderamen inculpate tutelæ*, is not at all punishable: That though the Defence were no higher pled, than as a just Provocation; yet it would be sufficient to assoilzie from a real Injury, at the Suit of the private Party, that the Pursuer himself was *author rixe*, and provoked the Pannels to commit the Injury that ensued. And here the Pannels beg Leave to notice the Interlocutor pronounced in the Process, at the Instance of his Majesty's Advocate, against *Anderson* and others Rioters in *Beith*; that was doubtless, as atrocious a Riot, as even this can be pretended to be, without noticing the Aggravation of deforcing the King's Officers: For there several Persons were cut, wounded and bruised to the outmost Danger of their Lives, Arms and other Bones were broke; And there the Libel was found relevant for a Riot to inter an arbitrary Punishment. But for eliding thereof, the Defence was sustained, That the Officers of the Customs, or some of them, did commit Acts of Violence against the Pannels, by whipping, or firing a Pistol at some of them, before the said Officers were invaded, as aforesaid.

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The Application of this Interlocutor, to the preſent Caſe, is too plain to be inſiſted on.

The Purſuer is pleaſed to obſerve, “ That
“ there are certain Inconſiſtencies in the Pan-
“ nels Defences, ſuch as he was drunk, and
“ yet they were afraid of being overtaken
“ by him, &c.”

It is needleſs to run through the ſeveral In-
ſtances the Purſuer mentions of theſe Inconſi-
ſtencies ; it appears by daily Experience, to
be no great Paradox, that a Man may be ſo
drunk, as to be both very quarrellſom and ill
natured, and yet ſtill to retain the Uſe and
Exerciſe of his Feet and Hands, to as great
Perfection, as when he is ſober, only with
the Addition of a great Deal more Cruelty and
ill Nature.

Upon the whole, the Pannels are conſcious
of their own Innocence, and they fully rely
upon it, that no Proof can be brought of their
being guilty of any of the Crimes laid to
their Charge: At the ſame Time, that they
have offered the ſeveral Defences, of Self-
defence, the firſt Provocation by real Injuries,
or *alibi*, which they doubt not to be able to
prove, and which they hope, your Lordſhips
will find ſeparately relevant to exculpate them,
even tho’ the Libel ſhould be proven.

In Reſpect whereof, &c.

J. G.

If

If betwixt and the Day to which the Court is adjourned, the rest of the Persons contained in the criminal Letters, and formerly declared Fugitives, give in a Petition to the Lords, craving to be reponed against the Fugitation pronounced against them, and that they are willing to appear, and stand Trial for the several Crimes contained in the Libel raised against them; The Lords, upon hearing of the Petition, take off the Sentence of Fugitation, and repone them against the same; and ordain them to find Caution, acted in the Books of Adjournal, for their Appearance all the Diets of Court.

The Criminals obey this Ordinance, by finding Caution accordingly.

But where the Criminals are declared Fugitives for not compearing, and denounced and registrate at the Horn, they must be relaxed in common Form, *viz.* The Persons being declared Fugitives, as before mentioned, Page 228. There is an Act of Adjournal extracted thereupon, that is the Libel with the Sentence. After this, there is a Bill made out by the Clerk, for Letters of Denunciation against the Criminals, and written on the Back thereof by him thus. *Apud Edinburgum*
—— die mensis —— anno Domini —— fiat
ut petitur; because the Lords have seen the
Act

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Act of Adjournal within mentioned. One Lord passes the Bill. Thereafter the Letters of Denunciation are expedé, whereof the Tenor follows.

Letters of Denunciation against the Criminals for not Compearance.

GEORGE by the Grace of GOD, King of Great Britain, France and Ireland, Defender of the Faith, To our Lovits

Macers, Messengers at Arms, Our Sheriffs in that Part conjunctly and severally, specially constitute, Greeting. FORASMUCHAS it is humbly meaned and shown to us by our Lovit *A. B.* of ——— **THAT WHERE,** in an Court of Justiciary, holden by our Lords Justice Clerk and Commissioners of Justiciary, within the Tolbooth or criminal Court-house of *Edinburgh*, the ——— Day of ——— last by past, *D. E. E. F.* and *F. G.* being oft times called to have compeared before our said Lords, the said Day and Place, in the Hour of Cause, to have underlyen the Law for the Crimes of Blood-wet, Battery, &c. (here the Libel is insert to the Words which being found proven) and then say, in Manner at length mentioned in the said criminal Letters raised at the said Complainer's Instance and our Advocate for our
Inte-

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Interest, against the forenamed Persons there-
anent. As they who were lawfully cited to
have compeared and come and found sufficient
Caution and Soverty acted in the Books of
Adjournal, for their Compearance before our
said Lords, to the Effect foresaid, lawful Time
of Day abidden; And they not enterand nor
appearand, Our Lords Justice Clerk and Com-
missioners of Justiciary, by the Mouth of
J. G. Macer of Court decerned and adjudged
the said *D. E. E. F.* and *F. G.* to be Out-
laws and Fugitives from our Laws, and or-
dained them to be put to the Horn, and all
other Moveable, Goods and Gear to be ef-
cheat and inbrought to our Use, for their not
compearing to underly the Law for the Crimes
abovementioned, as an Act of Adjournal ex-
tracted thereupon produced bears. Which
Act as yet remains unput to due Execution
anent the forenamed Persons their Denuncia-
tion to the Horn for the Crimes foresaid. **OUR
WILL IS HEREOFRE,** and we charge
you strictly and command, that in continent
thir our Letters seen, ye pass to the Market
Cross of *Edinburgh*, Head Burgh of the Sheriff-
dom thereof, within which the Justice Court
abovementioned was kept and holden, and
other Places needful, and there in our Name
and Authority, denounce the said *D. E. E. F.*
and *F. G.* our Rebels, and put them to our
Horn-

Horn, escheat and inbring all their Moveable Goods and Gear to our Use, for their being Out-laws and Fugitives from our Laws for the Crimes foresaid; and that ye within fifteen Days thereafter, cause registrate thir our Letters with the Execution thereof in our Books of Adjournal, conform to the Act of Parliament made thereanent. According to Justice, (because the Lords have seen the Act of Adjournal above-mentioned) as ye will answer to us thereupon. The which to do we commit to you conjunctly and severally our full Power, by thir our Letters, delivering them by you duly execute and indorsed again to the Bearer. Given under our Signet at *Edinburgh*, the — Day of — and of our Reign the — Year 17. —

Ex deliberatione Dominorum Commissionariorum Justiciarum.

J. D. Clerk.

These Letters are signet with their own Seal.

Follows the Messengers Execution upon the Letters.

Upon the — Day of — 17 — Years.
I J. G. Macer to the Justiciary Court, past
at Command of Letters of Denunciation, raised

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ed at the Instance of *A. B.* of — with Con-
course of *D. F.* his Majesty's Advocate for
his Highness Interest, against *D. E. E. F.* and
F. G. and by Vertue thereof, in his Majesty's
Name and Authority, past to the Market Cross
of *Edinburgh*, Head Burgh of the Sherifdom
thereof, where the Justice Court was holden
and kept, and there, after the crying of three
several Oyesses, open Proclamation and pub-
lick reading of the within written Letters,
I duly, lawfully and orderly denounced, the
said *D. E. E. F.* and *F. G.* his Majesty's
Rebels, and put them to his Highness Horn,
by three several Blasts of an Horn as Use is,
and ordained all their moveable Goods and
Gear to be escheat and inbrought to his Ma-
jesty's Use, for their being Out-laws and Fu-
gitives from his Majesty's Laws, for the Crimes
within-mentioned. This I did, after the Form
and Tenor of the said Letters in all Points,
which are dated and signet at *Edinburgh* the —
Day of — before these Witnesses — — and
— and for the more Verification hereof, I and
the said Witnesses have subscribed the same.

J. L. Witness.
J. D. Witness,

J. G. Macer.

These

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THESE Letters with the Execution muſt be regiſtrate in the Books of Adjournal, and a Bill of Caption is made out thereupon, and written on by the Clerk thus, *ſiat ut petitur*, becauſe the Lords have ſeen the regiſtrate Letters of Denunciation and Execution thereof, and ſigns on the Back of the Bill, and any Lord paſſes the ſame.

The Letters of Caption on the foreſaid Letters of Denunciation are the ſame as formerly mentioned, *Pages 217, 218, 219.*

The Criminals being reponed againſt the Sentence of Fugitation, and found Caution for their Appearance, Informations upon the former Debate being given in to the Lords, and the Court again meeting on the Day to which it was adjourned, the Affizers and Witneſſes being called and preſent, the Clerk inſerts the Sederunt of the Judges preſent, *viz.*

*Curia juſticiarü S. D. N. Regis, tenta in
pratorio burgi de Edinbuſgh — die menſis
— anno domini — per honorabiles viros
— juſticiarium clericum, dominos —
— — — — — & — commiſſionarios
juſticiarü dict. S. D. N. regis.*

Curia legitime affirmata.

The

before the Justiciary Court. 271

The Cause being called, and the hail Criminals appearing at the Bar, enter the Pannel, and the Clerk inserts in the Book,

Intran.

A. C. C. D. D. E. E. F. and F. G. indicted and accused *ut in die precedenti.*

The Preses desires the Clerk to read the Libel, and after the same is read, he asks the Pannels, who were declared Fugitives, what they have to say to their Indictment, and they denying the same, or as it is libelled, thereafter he asks the Lawiers for the Pursuers and Pannels, if they have any Thing more to plead, for or against these who were declared Fugitives, and now appear at the Bar, than what was already pled. If the Lawiers for the Pursuers have any Thing to plead against the Pannels, they go on and are heard, and Answers are made thereto by the Pannels Lawiers; but if neither Pursuers nor Pannels have any Thing more to say than what has been already said, then the Informations for the Pursuers and Pannels are read, in Presence of the Lords, Pannels and Assizers, and after reading, the Lords advise the Relevancy of the Libel, whereof the Tenor follows.

The Lords Justice Clerk, and Commissioners of Justiciary, having considered the Libel
Pur.

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pursued at the Instance of *A. B.* of — with Concourse of *D. F.* his Majesty's Advocate for his Highness's Interest, against *A. C. C. D. D. E. E. F.* and *F. G.* Pannels, with the foregoing Debate thereupon, they find, the Pannels or any of them, their beating, wounding or bruising the Pursuer with Stones or other Weapons the Time and Place libelled, or that they or any of them were accessory, or Art and Part thereof, relevant to infer an arbitrary Punishment, Damages and Expences, and repels the hail Defences proponed for the Pannels; and remit them and the Libel as found relevant, to the Knowledge of an Assize.

A. C. I. P. D.

Thereafter the Preses causes call the List of Assizers to answer to their Names, &c. The rest of the Form is already mentioned from *Page 189*, to the End of *Page 196*. Where the Verdict is returned against the Pannels, if the Verdict is in general, finding the Libel proven or the Pannels guilty, then the Lords pronounce Sentence after this or the like Manner.

The Lords Justice Clerk and Commissioners of Justiciary, in Respect of the foregoing Verdict of Assize, returned upon the — Day of — instant, against *A. C. C. D. D. E. E. F.* and *F. G.* Pannels, by the Mouth of *J. P.*
Macer

before the Justiciary Court. 273

Macer of Court, fine and amerciate the said *A. C.* in the Sum of *L. 80 Sterl.* The said *C. D.* in the Sum of *L. 70.* the said *D. E.* in the Sum of *L. 60,* the said *E. F.* in the Sum of *L. 50,* and the said *F. G.* in the Sum of *40 L.* And decern each of them to make Payment of the respective Sums to *A. B.* Pursuer, in Name of Damages and Expences, and ordain them to be imprisoned in the Tolbooth of *Edinburgh,* till the — Day of — and thereafter to remain in the said Prison, ay and while they make Payment of their said respective Sums, in Manner abovementioned, and thereafter to be set at Liberty, which is pronounced for Doom.

All of the Judges upon the Bench sign the Sentence.

Fines, Amerciaments, or Unlaws inflicted upon Offenders, or Persons guilty of Contumacy, are sometimes ordained wholly to be paid to the King, and sometimes only a Part of them, and the rest appointed to be given to private Parties injured, and sometimes the whole to the private Parties, or at least the most Part, and the rest to the Fisk, or applied to such other Uses, as the Judges think fit. For Payment of which Fines, Horning and Caption may be issued forth of Course, upon Acts

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of Adjournal : And Denunciation at the Market Cross of *Edinburgh*, Head Burgh of the Shire, within which the Court sits, will as effectually make Escheat fall, as if made at the Head Burgh of the Shire where the Parties dwell. Seldom the Lords grant that Privilege by Horning, but ordain them to be carried to Prison while Payment be made. The Macer of Court may indulge the Criminals a Favour, by keeping them in his Custody, some little Time till Payment be made.

And in Cases where Bills are allowed, for reponing Persons against Acts of Fugitation, or Fines for Contumacy, in not appearing to underly the Law, or to pass upon Assizes, or to bear Witness in Trials, or for not reporting criminal Letters ; When a Petition is refused, a second Petition for the same Thing cannot be offered, unless the Petitioner obtain Leave to withdraw his refused Petition, by giving in a Bill for that Effect.

THE



T H E
F O R M
O F
The JUSTICE AIRS, or Cir-
cuit COURTS.

BY the Regulations 1672, the Justice Deputes were suppress'd, and Five of the Lords of Session are adjoined to the Justice General and Justice Clerk. *Vide Chā. II. Parl. 2. Sess. 3. Cap. 81.*

It is ordained, That once a Year, in the Month of *April* or *May*, Circuit Courts be kept; that two of their Number are appointed to go and keep Circuits at *Dumfries* and *Jedburgh*, two at *Stirling*, *Glasgow* and *Air*, and
S 2 other

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other two at the Towns of *Perth*, *Aberdeen* and *Inverness*; the Justice General being always supernumerary in any of these Courts.

By an Act of Parliament of *Great Britain*, anno 6to. *Annae reginae*, 1707, it is statute, "That for the Future, twice in the Year, in the Month of *April* or *May*, and in the Month of *October*, Circuit Courts shall be kept in the several Places in Manner above mentioned."

And by the Queen's Proclamation, in the 11th *July* 1708, "Circuit Courts of Justiciary were appointed and ordained to be holden and kept, by the said Judges and Commissioners thereof, at the Places and upon the Months particularly above set down; and to begin their Sessions yearly, upon the first lawful Day of *October* and *May*, for the Shires, Bounds and Districts after mentioned, upon the Days after expressed. *Viz.* At the Burgh of *Inverness* the first lawful Day of *October* next to come 1708, and the first lawful Day of *May* 1709, for the Shires following."

The first District begins the said Day, or that being an unlawful Day, on the next lawful Day thereafter. And there to continue holding Courts for six Days, if the Business before these respective Circuit Courts do so require.

At

At the Burgh of *Inverness*, for the

Shires of { *Inverness,*
Ross,
Elgin,
Caithness,
Sutherland,
Cromerty,
and
Nairn, } and Stew-
artries of { *Orkney*
and
Zetland.

At the Burgh of *Air*, for the

Shires of { *Air,* and Jurisdictions within the same,
and
Wigtoun.

And at the Burgh of *Dumfries*, for the

Shires of { *Dumfries*
and
Nithsdale, } and Stew-
artries of { *Anandale*
and
Kirkcudbright.

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The *second* District begins on the 10. May, or, that being an unlawful Day, on the next lawful Day thereafter. And to continue at the said respective Burghs, holding Courts for the Space of six Days, if the Business before these respective Circuit Courts do require so long a Time.

At the Burgh of *Aberdeen*, for the

Shires of { Aberdeen,
Bamff and
Kincardin.

At the Burgh of *Glasgow*, for the

Shires of { Lanerk,
Dumbartoun,
Bute and
Renfrew.

And at the Burgh of *Jedburgh*, for the

Shires of { Roxburgh,
Berwick,
Selkirk and } and Bailiary of Lau-
Peebles, } derdale.

The

The *third* District commences on the 20. Day of *May*, if the same be lawful, and failing thereof, the next lawful Day thereafter. And there to continue, at each of the said Burghs, for their respective Districts, holding Courts for the Space of six Days, if the Affairs of the Circuit Courts do so require.

At the Burgh of *Perth*, for the

Shires of $\left\{ \begin{array}{l} \textit{Perth}, \\ \textit{Forfar} \text{ and} \\ \textit{Fife}. \end{array} \right.$

And at the Burgh of *Stirling*, for the

Shires of $\left\{ \begin{array}{l} \textit{Stirling}, \\ \textit{Clackmanan} \text{ and} \\ \textit{Kinross}. \end{array} \right.$

The Circuits continue at the said respective Burghs, for the Space of six Days, for each of the said two Months, holding Courts, if

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the Business thereof do require so much Time. And so forth yearly, upon the said Days of the said Months, and at the said Places, for the said Bounds and Districts, and for the said Space and Number of Days yearly, in all Time coming.

And all Dukes, Marquisses, Earls, Lords, Barons and other Free-holders, who hold Lands of the Crown, are obliged to give Suit and Presence at the said Courts, upon the Days, and at the Places aforesaid. And the Sheriffs and Free-holders, within the Shires of *Inverness*, *Air* and *Dumfries* are required to meet and receive the said Justices, at their Entry into the said Shires, upon the Days they shall get Advertisement of from the said Judges, whereon they are to enter into the said Shires, for holding Courts, and convoy them into the same, and accompany them during their Stay within the said Shire, and ay and while they be received by the next Sheriff and his Deputes, into the next Shire; and so received and conducted from Shire to Shire, by the respective Sheriffs thereof, according as they shall get Advertisement of the particular Days, whereon the Judges are to pass from Shire to Shire, until they return to *Edinburgh*.

By an Act of Parliament of *Great Britain*, anno octavo *Annæ reginæ* 1710, the Attendance of

of Noblemen, Barons and Free-holders, in that Part of *Great Britain* called *Scotland*, upon the Lords of Justiciary in their Circuits, in the Manner the same was heretofore used, was become burthensom and unnecessary:

“ Therefore the Parliament enacted, That
“ from and after the 1st, *May* 1710, no Per-
“ son whatsoever shall be obliged by him-
“ self, his Tenants or Servants, to attend
“ the Lords of Justiciary, either in going to,
“ or coming from the respective Places, where
“ the Circuit Courts are held; Except the
“ Sheriffs, or his Deputes, or their Officers;
“ and that no Sheriff by himself, or his De-
“ putes or Officers, be obliged to attend the
“ Lords of Justiciary, at any Time or Place,
“ out of the Bounds of the respective Coun-
“ ty whereof such Person is Sheriff, except
“ at the Place, and during the Time, where
“ the several Circuit Courts of the respective
“ Districts shall be held.”

“ And that from and after the said first Day
“ of *May*, no Person whatsoever shall be obliged
“ to attend at the Place, where the Circuit-Court
“ is held, during such Time as the said Court
“ shall continuethere; except such Person or
“ Persons, who shall be summoned upon any
“ grand or petty Juries, or who shall be sum-
“ moned or bound to give Evidence in any Mat-
“ ter or Cause before the said Court, or who
“ shall

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“ shall be bound over to appear at such Justice
“ Court, or such Person or Persons as shall make
“ Presentments, in order to Trials before the
“ said Justices at their Circuits. Provided, that
“ when Presentments are made by the Justices
“ of the Peace at their Quarter-Sessions, or at
“ the yearly Meetings in *July* and *February*, it
“ shall be lawful to the said Justices, to depute
“ one or more of their Number, to attend in
“ Place of the Whole.

“ That the Justices of the Peace in *Scotland*,
“ may do, use and exerce over all Persons
“ within their several Bounds, what ever doth
“ appertain to the Office and Trust of a Justice
“ of Peace, by Vertue of the Laws and Acts of
“ Parliament made in *England* before the Union.
“ By Vertue of which Powers and Privileges
“ vested in them for the Purposes aforesaid, they
“ have sufficient Authority to receive Informa-
“ tion concerning Crimes committed within the
“ respective Counties, and to commit such Of-
“ fenders, or take Soverty or Recognizance, and
“ to do other necessary Acts for the effectual
“ Prosecution of the said Crimes. In Conse-
“ quence whereof, the old Method of taking
“ up of Dittay and exhibiting Informations a-
“ gainst Delinquents by the Strefs and Porteous
“ Roll, as the same was grievous, is become
“ unnecessary; Therefore it was Enacted, that
“ from and after the first Day of *May*, One
“ thou.

“ thousand seven hundred and ten, the said
“ Method of taking up of Dittay and exhibit-
“ ing of Information by the Stress and Porteous
“ Roll, is thereby totally discharged and abolish-
“ ed to all Intents and Purposes whatsoever.

“ That Information, in order to making up
“ of Dittays concerning Crimes to be tried in
“ the said Circuits in *Scotland*, from and after
“ the said first Day of *May* next, shall be by Pre-
“ sentments to be made by the Justices of the
“ Peace in their Quarter-Sessions, or upon In-
“ formations to be taken by the Sheriffs, Stew-
“ arts, Bailies of Regalities or their Deputes,
“ Magistrates of Burrows, or other inferior Jud-
“ ges and Magistrates within the Jurisdiction
“ of the respective Circuits, concerning such
“ Crimes as are to be tried before the Lords of
“ Justiciary in their Circuits, in the Months of
“ *July* and *February* yearly, and the said Justices
“ of the Peace, at least two of them, are here-
“ by required and authorized to meet at the
“ Head Burgh of the respective Shires, within
“ which they are Justices, and at the ordinary
“ Place and Hour of Meeting, upon the twenty
“ first Days of *July* and *February* yearly respec-
“ tively, being lawful Days, or the next lawful
“ Day thereafter, there to receive such Informa-
“ tions as shall be offered, concerning Matters
“ Criminal to be tried in the Circuits, and to re-
“ vise such Informations as have been taken be-
“ fore

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“ fore the Time of the ſaid Mettings, by Two or
“ more of the Juſtices of the Peace, other wiſe
“ than at their Quarter-Sessions. And the ſaid
“ Sheriffs, Stewarts, Bailies of Regalities, and
“ their Deputes, Magiſtrates of Burrows and o-
“ ther inferior Judges and Magiſtrates *reſpective*,
“ ſhall meet upon the twenty ſecond Days of the
“ ſaid Months of *July* and *February* reſpectively
“ yearly, being lawful Days, or on the next law-
“ ful Day thereafter, at the ordinary Places and
“ Hour of their Meetings, there to receive ſuch
“ Information as ſhall be offered concerning
“ Matters Criminal to be tried in the Circuits.
“ And the ſaid Juſtices, Sheriffs, Stewarts, Bail-
“ lies of Regalities and their Deputes, Magiſ-
“ trates of Burghs, and other inferior Judges and
“ Magiſtrates, are thereby required and autho-
“ rized to make up particular Accounts of ſuch
“ criminal Facts happening within their reſpec-
“ tive Bounds, as are to be tried before the
“ reſpective Circuits, containing the Names and
“ Designations of the Offenders, the Facts com-
“ mitted, with the Circumſtances of Time and
“ Place and others that may ſerve to diſcover the
“ Truth, containing alſo the Names and Deſig-
“ nations of the Witneſſes, and Titles of ſuch
“ Writs as are to be made uſe of at the Trials.”

Which Informations are hereby appointed
to be ſigned by the ſaid Juſtices, or at leaſt
two of them and their Clerk, or by the ſaid
Sheriffs,

Sheriffs, Stewarts, Bailies of Regalities or their Deputes and Clerks, or by Magistrates of Burghs, or other inferior Judges or Magistrates and their Clerks respectively; and being so signed, the respective Clerks, are also hereby required and authorized to transmit the same, together with such Writs or other Evidence or Proof, as are to be made use of in the Trials before the Judges, at the respective Courts, to the Lord Justice Clerk or his Deputes at *Edinburgh*, at least 40 Days before the holding of the respective Circuit Courts, that being given to her Majesty's Advocate, or such as discharge that Trust in *Scotland*, Libels and Indictments may be raised and executed against Parties, Assizers and Witnesses, according to the former Laws and Customs.

The Magistrates of such Cities and Burghs, where the respective Circuit Courts are held, are obliged to attend the said Lords of Justiciary, during their Abode in their respective Cities and Burghs, and must prepare convenient Benches and Places for the Justices of the Peace to sit on, and be present at the said Courts, who are declared to have and enjoy the same Privileges in Court, as the Justices now enjoy in *England*.

By the Act of the 10th of Queen *Anne*, Circuit Courts are appointed to be kept once in the Year, and that in the Months of *April*
or

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or *May*, at the ſeveral Places and in Manner and Form as by Law eſtabliſhed. And that in all Time coming, the Circuit Courts formerly appointed to be kept in the Month of *October* yearly is to ceaſe, excepting only when it ſhall pleaſe her Majeſty or her Succeſſors, by a Proclamation to be iſſued in the Month of *July* preceeding, to order the ſaid Circuit Courts for the *October* following, to be kept at all or any of the Places abovementioned.

The Juſtices of Peace, Sheriffs, Stewarts, Bailies of Regalities and Magiſtrates of Burghs, are upon the Twenty ſecond Day of *February* yearly, to meet and receive what criminal Informations are preſented and given into them. And in Obedience to the ſaid Act of Parliament, they are to tranſmit the ſaid Informations ſigned by them and their Clerk of Court, in a Letter to the Lord Juſtice Clerk or his Deputes. And every Sheriff, when he tranſmits his Information, muſt ſend up a Liſt of Forty five Perſons, one half landed, and the other unlanded Men, to paſs upon the Aſſize of the Pannels indicted before that Diſtrict, and out of the ſeveral Liſts ſent up, there is a Liſt of Forty five Perſons made out and ſent with the Roll, but generally the Liſt of Aſſizers are made out of the Liſts where Preſentments are, and ſometimes the Liſts are divided equally, but this is at the Direction

Direction of the Lord Justice Clerk, who after receiving the Letter, orders the Information to be insert in a Book kept for that purpose, and after they are written in the Book, they are immediately delivered to his Majesty's Advocate or his Deputes, in order to make up the Indictments. And in Case any of the Informations shall be left out in the Roll, in that Case, the Advocate gives his Reason, and writes it in the Book, or on the Presentment. And after the Indictments are made out, they are written in a Roll where the Names and Designations of the Criminals and Witnesses are written on the one Side, and the Indictment on the other: And this is called the Porteous Roll, whereof the Tenor follows. The Title on the Head of the Roll is as follows,

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Roll of Delinquents within the Shire of —, to be tried by the Lords Commissioners of Justiciary within the Tolbooth of — upon the first of May, 17 —

Names of the Criminals and their Designations.

*A. B. Merchant in —
C. D. Merchant in —
Etc.*

Names and Designations of the Witnesses.

*R. F. Merchant in —
D. G. Merchant in —
Etc.*

D. F.

Indictment.

You and each of you are indicted and accused at the Instance of *D. F.* his Majesty's Advocate for his Highness's Interest, and at the Instance of —, private Party concerned, as Guilty, Art and Part of the Crimes of —, in so far as. (Here take in the Indictment.) This Indictment is signed by the Advocate or his Depute, and he signs his Name to the Witnesses on the other Side. The Form of such Indictment is before-mentioned,

D. F.

After the Indictment is made out and signed in Form, the Advocate or his Depute gives

it into the Clerk of Court to put a Precept thereto, which Precept is signed by the Clerk, by Order of the Lords, and directed to the Sheriff for executing the said Porteus Roll. The Tenor of which Precept is as follows, *viz.*

Sheriff of the Sherifffdom of —, your Deputes and Officers whatsoever, ye shall in continent after Sight hereof, with all Diligence, lawfully summon, arrest and cause be arrested, the hail Persons Delinquents particularly above named, dwelling within the Bounds of your respective Jurisdiction, personally, if they can be apprehended, and failzieing thereof, at their Dwelling-places, and at the Market-Cross of the Head Burgh of the Shire where they dwell; and arrest their Goods and Gear, and take Caution of them if need bees, that they shall compear before the Lords of his Majesty's Justiciary, in a Circuit Court to be holden by them within the Burgh of *Inverness* the first, second and third Days of *May* next to come, in the Hour of Cause, with Continuation of Days, there to underly the Law, for the several Crimes mentioned in their respective Indictments; And that ye affix Copies as effeirs; And als that ye lawfully summon the hail Witnesses above named, to bear leil and soothfast witnessing, in so far as they know of the said Delinquents

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their

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their Guiltineſs of the Crimes foreſaid, with ſo many honeſt and famous Aſſizers, as dwell within your Jurisdiction, of the Number contained in the Liſt of Aſſize, herewith delivered to you, to paſs upon the ſaid Delinquents their Trial. All to compear Days and Place to the Effect foreſaid, every one of them under the Pain of One hundred Merks ; and that ye deliver to every Delinquent a juſt Copy of his Dittay, with a Liſt of Witneſſes and hail Aſſizers that are to paſs upon their Trial. And alſo that ye, your Deputes and Officers be preſent at the ſaid Juſtice Court before the Down ſitting and Fencing thereof, bringing with you this Roll, with the Executions, upon arreſting of the ſaid Delinquents, and ſummoning Witneſſes and Aſſizers. The whilk to do commits to you conjunctly and ſeverally full Power, by this Precept, given by Warrant of the Lords Juſtice General, Juſtice Clerk and Commiſſioners of Juſticiary, at *Edinburgh*, the — Day of — 17 — Years, under the Hand of J. D. Clerk to the Juſticiary Court.

J. D. Clerk.

After the Precept is written and ſigned, the Clerk puts the Roll, with the Liſt of Aſſize, up in a Covert, ſeals and directs it thus. To the Sheriff Principal of the Shire of *Inverneſs*,

ness, and in his Absence to his Deputes or Clerk of Court, for his Majesty's special Service; and hereafter delivers it to the Solicitor or his Depute to be sent away.

After the Rolls are all made out and sent off; then the Judges, two and two, towards the latter End of the Month of *April*, set out for their respective Districts, the Justice General when he goes may go any District he pleases, and if by Reason of Sickness, two shall be reduced to one: In that Case, 'tis declared, that one Lord shall be sufficient to hold the Circuit alone, and the Judges, accompanied with some Friends and Servants, a Macer of Court and two Trumpets, proceed on their Journey till they come within the Bounds of the first District, where the Sheriff of the County or his Depute, with his Officers, meet them and convey them into the Head Burgh of the District, where the Court sits, and a little without the Town, the Magistrates, accompanied with several of the Burgeses, go out and meet them, and accompany them into the Town; and so soon as the Lords enter the Town, the Macer of Court goes before them discovered and his Mace displayed, and the Trumpeters before them likewise discovered, sounding all the Way to the Apartment where the Judges lodge, and then alight and part.

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His Majesty's Advocate, if he goes not himself, gives a Deputation to three Advocates, for being his Deputes, for prosecuting all Indictments, against the several Pannels indicted, before the several Justice Airts.

If the Day following be the Sabbath-day, then the Judges prepare for, and go to the Church in their Robs, attended by the Magistrates of the Place, with their Officers going before them, with their Halberts, discovered, in the *first* Rank. The respective Sheriffs of the several Counties of the District, in the *second* Rank. The Trumpeters in their Coats, sounding all the Way to the Church, in the *third* Rank. The Macer of Court in his Gown uncovered, displaying his Mace, in the *fourth* Rank. Then the Judges in their Robs, after them the Advocate Depute and Clerk of Court, in their Gowns, and after them, the Nobility and Gentry. And return the same Way, both Forenoon and Afternoon.

The Evening the Judges come in, or the next Day before sitting of the Court, the several Sheriff Deputes, wait upon the Clerk of Court, to give in their respective Rolls, with the Executions against Parties, Witnesses and Affizers, which the Clerk receives from them. And in case of any Informality, the Sheriff Officer is to answer thereto: For
which

which Cause, the Sheriff Officers are likewise to attend, as the Precept directs. And if any of the Pannels be under Caution, the Sheriff gives in their Bonds to the Clerk of Court, who, if they do not compear when called, are declared Fugitives, and their Bond forfeited.

The Day thereafter, at Nine of the Clock in the Morning, the Judges prepare for going to the Court House, attended as before mentioned. And after they are placed on the Bench, the Macer by Order of Court commands Silence; which being done, the Lords order the Clerk to fence the Court, which the Clerk pronounces to the Macer thus.

I defend and forbid, in his Majesty's Name and Authority, and in Name and Authority of the Right Honourable ——— and ——— Lords Commissioners of Justiciary, Judges present, let none presume, nor take upon Hand, to trouble or molest this Court, or speak one for another, without Leave asked and given, under such Pains as they may incur by Law.

GOD save the King.

After fencing the Court, his Majesty's Advocate Depute represents to the Judges, That he having a Commission from his Majesty's

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Ad-

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Advocate, for being his Depute, craves the same may be read, and ordered to be recorded; which being done, and he qualified in the Terms of Law, gives his Oath *de fide-
li administratione officii*.

Thereafter the Clerk of Court represents to the Lords, That he having a Commission from the Clerk of Justiciary, to act for him as his Depute, craves the same may be read, and ordered to be recorded, and he qualified in the Terms of Law, and gives his Oath *de fide-
li administratione officii*.

And both their Commissions are registrat-
ed in the Journal Book of Justiciary. And
the Clerk inserts the *Sederunt* of the Judges
present, after this Manner, viz.

*Curia itineris justiciarum S. D. N. Regis,
tenta in pratorio burgi de ———
—— die mensis Maij 17 — per ho-
norabiles viros ——— et ———
commissionarios justiciarum dict. S. D. N.
regis.*

Curia legitime affirmata.

Thereafter his Majesty's Advocate Depute
craves, That the several Sheriff Deputes may
be called, which being done, and answering
to their Names, they are marked present;
but

but if any be absent, they are unlawed in 100 Merks, for not attending the Court.

Then the Advocate Depute craves, That the List of Assizers may be called, and the Absents unlawed: Which being done, and the Absents not appearing, after calling them three times at the Bar, by the Macer of Court, and three times at the Door and Windows of the Court House, by the Sheriff Officers, are fined in 100 Merks each, for not compearing, to pass upon the Assize of the several Pannels, indicted before this Justice Air; and this Unlaw is recorded in the Book.

Thereafter the Advocate Depute craves, That the several Pannels and Witnesses, contained in the Porteous Rolls, for the several Shires, may be called; which being done, and several of the Pannels and Witnesses not answering, the Pannels are declared Fugitives, and the Witnesses unlawed in 100 Merks each.

But in case of Compearance, then the Advocate Depute goes on to the several Rolls by Degrees. And if any of the Pannels are in Prison, they are ordinarily called first.

The Prisoners being sent for, and entring the Pannal, the Clerk writes in the Book thus.

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Intran.

A. B. &c. indicted and accused, at the Instance of *D. F.* his Majesty's Advocate, for his Highness Interest, for the Crime of Murder, committed by them in Manner mentioned in their Indictment, contained in the Porteous Roll for the Shire of —

Thereafter their Indictment is ordered to be read, which being done, the Preses asks them, What they have to say to their Indictment? If they all deny their being guilty of the Facts therein contained, or as it is libelled; then the Judges ask them, If they have any Lawyers to plead for them? And having none, the Judges appoint them Lawyers, and continue the Diet till next *Sederunt*: But if they have, then the Pleading goes on; and the Clerk inserts in the Book thus.

Pursuers.

His Majesty's Advocate Depute,
Mr. J. M. Advocate.

Procurators in Defence.

Mr. J. G. } Advocates.
Mr. R. D. }

The Lawyers debate the Relevancy of the Libel *viva voce*, and their Pleading is minuted

nuted by the Clerk in Court, and thereafter insert in the Book. And after the Pleading is over, the Judges either continue to determine the Relevancy till next *Sederunt*, or do it instantly, and appoint the next *Sederunt* for adducing the Proof.

Thereafter the Court again meeting, and the Cause being called, and the Prisoners appearing at the Bar, the Interlocutor on the Relevancy being again read, and after reading, fifteen out of the forty five Assizers are chosen and sworn, and the Probation adduced; and the Jury incloses, and are ordained to return their Verdict next Day at Nine a Clock, each under the Pain of 100 Merks.

The next Day the Court meets, and the Prisoners appearing at the Bar, the fifteen Assizers are called, and answering to their Names, the Chancellor of the Assize, when called, gives in the Verdict. After it is opened and read by the Lords, it is given to the Clerk to record; and after recording and reading it to the Pannels, it is sealed, by the Chancellor or Clerk's Seal, never to be opened without a Quorum of the Lords. Thereafter the Lords pronounce Sentence.

And in case at any of the Districts, the Lords are straitned of Time, so that they cannot overtake their Affairs, they may, if they think

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think proper, continue some of the Causes till the next Justice Air, and ordain the Pannels to find Caution for their Appearance; and remit others to the Court of Justiciary at *Edinburgh*. If the Crime beailable, ordain them to find Caution for their Appearance at a certain Day; if notailable, Warrant is granted for transporting the Criminals accordingly.

And in all the Crimes before mentioned, as they are in their Nature the more hainous, the Punishment is made the more exemplary, such as their Heads, Hands and Limbs put on publick Places, on Spears, and their Bodies hung in Chains, &c. And if the Crime be Treason, to be drawn and quartered.

Whatever Pannels are declared Fugitives, Witnesses, Assizers or Pannels fined, or the Pannels Goods declared to be Escheat, at any of the Circuits, the Clerk gives them up on Oath to the Court of Exchequer, in a List subscribed by him, after the Circuits are over.

After the Porteous Rolls are all ended, the Judges order the respective Sheriffs to be called, and put in the Pannal, and a Proclamation in Court is made, That if any Person, or Persons have any Information of Crimes, against the Sheriffs present, let them compear, and they shall be heard. And if any Informa-
tion

tion be given in, and found relevant and proven against them, they are immediately put to an Assize, and punished accordingly.

In the Trials of Women for murdering their Children, it has been observed by the Lords of Justiciary in their several Circuits, that the Act of Parliament, *William and Mary*, Parliament 1, *Seff.* 2, *Act* 21. *Anent murdering of Children*, was seldom or never read in Parish Churches; by which Neglect, there were frequent Murders committed, by Mothers upon their Children, and thereby became obnoxious to the Law, in not revealing their being with Child, and calling for, and making use of Help and Assistance in the Birth. And their Lordships have several Times recommended to all inferior Judges, Magistrates, Ministers and others, to see the said Act of Parliament duly read and proclaimed, through the several Parish Churches in the respective Circuits; whereof the Tenor follows.

Act Anent Murdering of Children.

THE King and Queen's Majesties considering, the frequent Murders that have or may be committed upon innocent
In-

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Infants, whose Mothers do conceal their being with Child, and do not call for necessary Assistance in the Birth, whereby the new born Child may be easily stifled; or being left exposed, in the Condition it comes to the World, it must quickly perish. For preventing whereof, their Majesties, with Advice and Consent of the Estates of Parliament, do statute, enact and declare, That if any Woman shall conceal her being with Child, during the whole Space, and shall not call for, and make use of Help and Assistance in the Birth, the Child being found dead or amissing, the Mother shall be holden and reputed the Murderer of her own Child: And ordain all Criminal Judges to sustain such Process, and the Libel being remitted to the Knowledge of an Inquest, it shall be sufficient Ground for them to return their Verdict, finding the Libel proven, and the Mother guilty of Murder, tho' there be no Appearance of Wound or Bruise upon the Body of a Child. And ordain this Act to be printed and published, at the Market Crosses of the Head Burghs of the severall Shires, and to be read in all the Parish Churches, by the Reader of the Parish.

And

And before the Justice Air is ended, the Lords make a Speech to the inferior Judges, That they be faithful, in putting the Laws in Execution against all Delinquents; and that they take Care of the high Ways, &c.

After all is ended, the Lords order the Clerk to declare the Justice Air ended; which the Clerk pronounces to the Macer thus.

The Lords Commissioners of Justiciary, and I, in their Name, declare the Justice Air in this Place to be ended.

F I N I S.





ERRATA.

Page 10. Line 15. Lasphemy, read, Blasphemy. P. 32. L. 16. continent, r. incontinent. P. 56. betwixt L. 24. and L. 25. add
S E C T. VI. P. 68. L. 17. without, r. with. P. 69. L. 1. A, r. And. P. 79. L. 12. to, r. or an. P. 171. L. 19. with, r. without. P. 201. L. 9. Boodwet, r. Bloodwet.

ERRATA

[The page contains faint, illegible markings.]